DOCKET

No. 88-420-CFH Title: Jimmy Jones, Superintendent, Missouri Training Center for Men at Moberly, Petitioner
Status: GRANTED v.
Larry P. Thomas

Docketed:
September 7, 1988 Court: United States Court of Appeals for the Eighth Circuit

Counsel for petitioner: Morris III,John M.

Counsel for respondent: Baldwin,Springfield

Entry	Date	Note	Proceedings and Orders
1	Sep 7 1988	G	Petition for writ of certiorari filed.
2	Oct 12 1988		DISTRIBUTED. October 28, 1988
3	Oct 25 1988	F	Response requested -- BRW.
4	Nov 4 1988		Order extending time to file response to petition until December 5, 1988.
5	Nov 23 1988		Brief of respondent Larry P. Thomas in opposition filed.
6	Nov 23 1988	G	Motion of respondent for leave to proceed in forma pauperis filed.
7	Nov 30 1988		REDISTRIBUTED. January 6, 1989
8	Jan 9 1989		Motion of respondent for leave to proceed in forma pauperis GRANTED.
9	Jan 9 1989		Petition GRANTED.
			**********
10	Jan 17 1989	G	Motion of respondent for appointment of counsel filed.
11	Jan 18 1989		DISTRIBUTED. Feb. 17, 1989. (Motion for appointment of counsel).
12	Feb 21 1989		Motion for appointment of counsel GRANTED and it is ordered that Springfield Baldwin, Esquire, of St. Louis, Missouri, is appointed to serve as counsel for the respondent in this case.
13	Feb 21 1989		Record filed.
		*	Certified original record and proceedings, 2 volumes, received.
14	Feb 23 1989		Brief amicus curiae of United States filed.
15	Feb 23 1989		Joint appendix filed.
16	Feb 23 1989		Brief of petitioner Jimmy Jones, Supt., etc. filed.
17	Feb 23 1989	G	Motion of Criminal Justice Legal Foundation for leave to file a brief as amicus curiae filed.
19	Mar 8 1989		SET FOR ARGUMENT, APRIL 26, 1989. (3rd CASE)
21	Mar 8 1989	D	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
22	Mar 8 1989		Opposition of respondent to motion of Criminal Justice Legal Foundation for leave to file a brief as amicus curiae filed.
20	Mar 13 1989		Brief of respondent Larry P. Thomas filed.
23	Mar 20 1989		Motion of Criminal Justice Legal Foundation for leave to file a brief as amicus curiae GRANTED.
24	Mar 20 1989		Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument DENIED.

Entry	Date	Note	Proceedings and Orders
25	Mar 28 1989		CIRCULATED.
26	Apr 13 1989	X	Reply brief of petitioner Jimmy Jones, Supt., etc. filed.
27	Apr 18 1989		Record filed.
		*	Certified copy of original record received.
28	Apr 26 1989		ARGUED.

PETITION FOR WRIT OF CERTIORARI

(1)

88-420

No.

FILED
SEP 7 1988
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1988

JIMMY JONES,
Petitioner,
vs.
LARRY P. THOMAS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED

WHETHER THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT COULD OVERTURN A STATE COURT-GRANTED REMEDY FOR A DOUBLE JEOPARDY VIOLATION AS BEING CONTRARY TO ITS UNDERSTANDING OF STATE LAW.

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No.

In the Supreme Court of the United States

OCTOBER TERM, 1988

JIMMY JONES,
Petitioner,

vs.

LARRY P. THOMAS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Eighth Circuit, en banc, granting the petition for a writ of habeas corpus by a 5 to 4 vote, is reported at 844 F.2d 1337 (8th Cir. 1988) (en banc) (App. A2). The panel opinion of the United States Court of Appeals for the Eighth Circuit granting the petition for a writ of habeas corpus is reported at 816 F.2d 364 (8th Cir. 1987) (App. A24). The opinion of the United States District Court for the Eastern District of Missouri denying the petition for a writ of habeas corpus is unpublished, but is included in the Appendix (App. A51). The Magistrate's Review and Recommendation is also unpublished, but is included in the Appendix (App. A55).

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Eighth Circuit, sitting en banc, issued its Opinion on April 21, 1988. Petitioner's timely petition for rehearing en banc was denied on June 9, 1988 (App. A1). Pursuant to 28 U.S.C. §2101(c) and Supreme Court Rule 20, the present petition for a writ of certiorari was required to be filed within ninety days of the denial of rehearing en banc. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

RELEVANT CONSTITUTIONAL PROVISIONS AND STATE RULE

1. The Fifth Amendment to the United States Constitution:

> No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation.

2. Section 1 of the Fourteenth Amendment to the United States Constitution:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof are

> citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

3. Missouri Supreme Court Rule 27.26 (repeal effective January 1, 1988) provides, in pertinent part:

> A prisoner in custody under sentence and claiming a right to be released on the ground that such sentence was imposed in violation of the Constitution or laws of this state or the United States, or that the court imposing such sentence was without jurisdiction to do so, or that such sentence was in excess of the maximum sentence authorized by law or is otherwise subject to collateral attack, may file a motion at any time in the court which imposed such sentence to vacate, set aside, or correct the same.

STATEMENT OF THE CASE

At approximately 6:15 p.m. on November ....., 1972, Mentoe Vernell went to the Reid Auto Parts Store located at 4750 Martin Luther King Drive, St. Louis, to pay his bill. The general manager, a clerk, and Vernell, a regular customer, were the only persons in the store. A short time later, respondent Larry Thomas and a companion, Fancell Johnson, entered the store. Johnson walked over to the general manager and inquired about auto parts. At this time, respondent announced a holdup.

Vernell reached out for respondent, who had a gun in his hand. Respondent fired four or five shots point-blank at Vernell before Vernell reached into his pants pocket, pulled out a gun and fired three shots, striking respondent in the arm and leg. Respondent and Vernell fell wounded to the floor. The police, who arrived at the scene almost immediately, disarmed respondent. Vernell and respondent were then taken to the hospital. Vernell died from the gunshot wounds while en route to the hospital. Upon this evidence, respondent was convicted of attempted robbery first degree by means of a dangerous and deadly weapon and first-degree murder (felony murder), for which he was sentenced to fifteen years and life imprisonment, these sentences to run consecutively and in that order. On direct appeal, the Missouri Court of Appeals affirmed the convictions. *State v. Thomas,* 522 S.W.2d 74 (Mo.App., St.L.D. 1975) (App. A84).

On June 16, 1981, Governor Christopher Bond commuted respondent's sentence for attempted robbery (App. A89).

On February 7, 1977, respondent initiated a post-conviction action pursuant to Missouri Supreme Court Rule 27.26 in the Circuit Court of the City of St. Louis. On the basis of new Double Jeopardy Clause law, *State v. Morgan,* 612 S.W.2d 1 (Mo. banc 1981); *State v. Olds,* 603 S.W.2d 501 (Mo. banc 1980), the circuit court granted relief on June 24, 1982. Respondent's conviction and sentence for attempted robbery were vacated (App. A82). The time previously served on the attempted robbery conviction was credited towards completion of the felony murder sentence. *Thomas v. State,* 665 S.W.2d 621, 625 (Mo.App., E.D. 1983) (App. A70 to A71). The Missouri Court of Appeals, Judges Parrish and Pudlowski and Senior Judge James A. Finch, affirmed the circuit court's

procedure. *Id.* Then the present habeas corpus litigation began.

Respondent filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. §2254 on August 1, 1984, in the United States District Court for the Eastern District of Missouri. On September 7, 1984, petitioner filed his response to United States District Judge Limbaugh's show-cause order. Without the need of an evidentiary hearing, Magistrate Robert Kingsland filed his Review and Recommendation on March 29, 1985. He found respondent's claim meritorious, and recommended that the petition be granted (App. A55). On June 28, 1985, Judge Limbaugh rejected the Review and Recommendation and denied respondent's application for a writ of habeas corpus (App. A51). The district court judge found that respondent suffered from no multiple punishment because the life sentence for felony murder was a sentence authorized by the Missouri Legislature. Respondent had not suffered punishment greater than that intended by the Legislature (App. A53 to 54). Respondent filed a notice of appeal to the United States Court of Appeals for the Eighth Circuit.

On April 3, 1987, a panel of the Court of Appeals reversed and remanded the case. The panel issued three separate opinions that reversed the judgment of the district court and remanded the case for resentencing or retrial. *Thomas v. Morris,* 816 F.2d 364, 371 (8th Cir. 1987). Two members of the panel, Circuit Judge McMillian and Senior District Judge Hanson, agreed that respondent had legally satisfied the sentence he received for the attempted robbery and that the subsequent vacation of that sentence and respondent's continued confinement under the felony murder conviction violated the Double Jeop-

ardy Clause, but could not agree on the remedy necessary to correct the double jeopardy violation. *Id.* at 367 (majority opinion). Additionally, Circuit Judge Bowman did not believe that a double jeopardy violation had occurred, because respondent was serving only one sentence (life) for one conviction (felony murder). *Id.* at 372 (Bowman, J., dissenting in part). Nonetheless, he joined with Senior District Judge Hanson in holding that any double jeopardy violation which had occurred could be corrected by either resentencing or retrial. *Id.* at 371, 372. Judge McMillian, in a separate concurring and dissenting opinion, held that the double jeopardy violation could not be cured either by resentencing or retrying Thomas on the lesser included offense of murder, and thus, Thomas should be granted full habeas corpus relief. *Id.* at 371 (McMillian, J., concurring in part and dissenting in part).

Both petitioner and respondent filed petitions for rehearing en banc. Upon rehearing, the court fractured into two opinions. Circuit Judge McMillian, writing for himself and Judges Lay, Heaney, Arnold and Magill concluded that the state court's efforts to cure the double jeopardy violation were in vain; thus, full federal habeas corpus relief should issue. Circuit Judges Bowman, writing for himself, John Gibson, Fagg and Wollman dissented. They reasoned that respondent had not suffered multiple punishment due to the effective grant of post-conviction relief by the Missouri state court. The dissent articulated that the majority's position was "preposterous." *Thomas v. Morris*, 844 F.2d 1337, 1345 (8th Cir. 1988) (en banc) (Bowman, J., dissenting). Following the court's denial of petitioner's petition for rehearing en banc (App. A1), this petition for a writ of certiorari ensues.

ARGUMENT

The Court of Appeals' En Banc Majority Opinion Clearly Misconstrues Missouri State Law Concerning the Scope of Post-Conviction Review in State Court and Ignores an Effective Grant of Relief by the State Court. As Petitioner Properly Received All the Relief to Which He Was Granted in State Court, He Is Entitled to No Further Relief Through a Writ of Habeas Corpus.

Respondent was convicted for one crime (felony murder) and was sentenced to one punishment (life imprisonment). From these facts, only the United States Court of Appeals for the Eighth Circuit, in a 5 to 4 vote, could find a violation of the Double Jeopardy Clause of the Fifth Amendment. The majority could only find the "violation" by ignoring the state court-created remedy for an earlier double jeopardy violation. The state had fully cured the earlier violation; thus, the Eighth Circuit had no reason to impose its own cure upon the State of Missouri.

This Court should issue a writ of certiorari in this case due to the important question of federal law involving federalism—in particular, the relationship between federal and state judiciaries. Supreme Court Rule 17.1(a), (c). In the past, this Court has gone to great lengths to preserve the delicate balance between federal and state governments. By ignoring those time-honored principles of federalism, the en banc majority opinion destroys that delicate balance, intrudes into matters of state interest, and unjustly discharges a murderer from custody. Whether a federal court may intrude into the state's police

power by ruling that a state court has no power to grant post-conviction relief is not only an important question worthy of review under Supreme Court Rule 17, but should also mortify each Justice that reads this petition.

This significant federalism principle is the conceptual basis underlying the statutory exhaustion requirement of 28 U.S.C. §2254(b), (c). As discussed in *Rose v. Lundy*, the state is exercising its police power when it convicts and sentences a person to prison. The *Rose* Court also recognized the important role state courts have in ensuring that their police powers are exercised within the framework of the federal Constitution.

> The exhaustion doctrine is principally designed to protect the state courts' role in the enforcement of federal law and [to] prevent disruption of state judicial proceedings. . . . Under our federal system, the federal and state "courts [are] equally bound to guard and protect rights secured by the Constitution." . . . Because "it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation," federal courts apply the doctrine of comity, which "teaches that one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter."

Rose v. Lundy, 455 U.S. 509, 518, 102 S.Ct. 1198, 1203, 71 L.Ed.2d 379 (1982) (citations omitted). There is no doubt from this language from *Rose v. Lundy*, as reinforced by this Court in *Granberry v. Greer*, ... U.S. ....., 107 S.Ct. 1671, 1674-1675, 95 L.Ed.2d 119 (1987), that this Court believes that comity is a significant value that requires United States Supreme Court protection. *See also, Murray v. Carrier*, 477 U.S. ....., 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986) (comity concepts underlying enforcement of state procedural-default rules); *Sumner v. Mata*, 449 U.S. 539, 101 S.Ct. 764, 66 L.Ed.2d 722 (1981) (comity concepts underlying the presumption of correctness of 28 U.S.C. §2254(d)); *Stone v. Powell*, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976) (comity concepts and the Fourth Amendment).

The en banc majority opinion destroys comity between the federal system and state system of government. The en banc majority opinion ignores the effectiveness of the Missouri state court's grant of post-conviction relief. The en banc majority acted as a "super state supreme court" when it construed state law and declared that the state's post-conviction relief court could not vacate the attempted robbery conviction and credit that time towards service of the felony murder sentence. Obviously, when a federal court acts as a "super state supreme court"—especially, when defining the scope of the state's post-conviction remedy—comity between the federal and state systems is tortured.

There is no doubt that at one time, respondent's Fifth Amendment double jeopardy rights[1] were violated by his conviction for both felony murder and the underlying felony. The Missouri State Supreme Court has determined that the Missouri General Assembly did not in-

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1. The Due Process Clause of the Fourteenth Amendment incorporates the Fifth Amendment's prohibition against placing a defendant twice in jeopardy. *Benton v. Maryland*, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969).

tend, at the time of respondent's offenses, multiple punishments for felony murder and the underlying felony. *State v. Morgan*, 612 S.W.2d 1 (Mo. banc 1981); *State v. Olds*, 603 S.W.2d 501 (Mo. banc 1980).[2] Since there was a violation of the Double Jeopardy Clause of the Fifth Amendment, it is unsurprising that respondent received state post-conviction relief from the Circuit Court of the City of St. Louis under Missouri Supreme Court Rule 27.26. The state's circuit court granted respondent relief by vacating the conviction for attempted robbery and setting aside the fifteen-year sentence (App. A82). The time respondent served toward completion of this sentence was credited to the life sentence for felony murder (App. A70-71). This remedy fully cured the previous double jeopardy violation. After the state post-conviction litigation, respondent served only one conviction and sentence for felony murder. After the state post-conviction litigation, respondent had only served prison time towards completion of his sentence for felony murder. The state court's relief cured the double jeopardy violation. Since respondent had only one conviction and one sentence, how did the en banc majority find a double jeopardy violation?

Ignoring two hundred years of federalism principles, the en banc majority opinion declared that the state circuit court had no power to vacate the attempted robbery sentence because Governor Christopher Bond had previously commuted the sentence for the attempted robbery conviction (App. A89). *See, Thomas v. Morris*, 844 F.2d at 1340. Whether the state circuit court had the power or jurisdiction to vacate the attempted robbery conviction is

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2. The Missouri Legislature reformed the statutes to allow multiple punishment in 1984. *See* § 565.021.2, RSMo 1986.

not an issue for a federal appellate court. Generally, a state court's determination of jurisdiction is binding on the federal court. The Eighth Circuit recognizes this principle occasionally. *See, e.g., Martin v. Solem*, 801 F.2d 824, 831 (8th Cir. 1986). The availability of remedies in state court is an issue of state law, not federal law. *Feeney v. Auger*, 808 F.2d 1279, 1283 (8th Cir. 1986); *see Wainwright v. Goode*, 464 U.S. 78, 84, 104 S.Ct. 378, 382, 78 L.Ed.2d 187 (1983) (state court's determination of state law binding on federal court).

The state circuit court determined that it had the power and jurisdiction to enter an order vacating the attempted robbery conviction. The state court heard respondent's double jeopardy claim, resolved its merits, and ordered that respondent receive relief. The state court did not find a procedural bar, *i.e.*, the lack of custody as a result of the commutation, to preclude a grant of relief. Even if there had been a bar to relief from the Governor's commutation, the State of Missouri waived that procedural defense when it was not asserted to the Rule 27.26 circuit court.[3] Additionally, the procedural-bar defense was waived when the state did not cross-appeal the circuit court's grant of relief to the Missouri Court of Appeals. The state circuit court determined that it had jurisdiction to vacate the conviction and sentence for attempted robbery. The rationale the Eighth Circuit used to ignore the effectiveness of the relief was insufficient to preclude

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3. The State's assertion of this procedural defense would have been a mere formality. If respondent had not fulfilled the state court's custody requirement under Missouri Supreme Court Rule 27.26, then the trial court would nonetheless have retained jurisdiction to consider the claim via a writ of error *coram nobis*. *Dixon v. State*, 594 S.W.2d 360, 361 (Mo.App., W.D. 1980); *Dearing v. State*, 631 S.W.2d 328 (Mo. banc 1982).

state-court relief, according to the binding interpretation of state law by the state court.

Respondent received relief sufficient to cure the double jeopardy violation from the state court. An analogy to the federal habeas corpus statute, 28 U.S.C. §2254, will help to illustrate the power and jurisdiction of the Missouri state circuit court to grant relief for the double jeopardy violation notwithstanding the Governor's commutation. If respondent had filed his habeas corpus petition in 1977, the year he filed his state court action, and had received his Governor's commutation in 1981, then a federal court, under 28 U.S.C. §2254, would have ruled in 1982, the year the state court granted relief, that only the attempted robbery conviction needed to be vacated. Federal habeas corpus jurisdiction attaches at the filing of the petition. It cannot be defeated by the state's executive's use of parole, pardon or commutation. *Jones v. Cunningham*, 371 U.S. 236, 83 S.Ct. 373, 9 L.Ed.2d 285 (1963). Federal habeas corpus jurisdiction exists even though a sentence is completed pending consideration of the petition. If a federal court maintains the power to vacate the attempted robbery conviction, notwithstanding the commutation, *see, Carafas v. LaVallee*, 391 U.S. 234, 239, 88 S.Ct. 1556, 1560, 20 L.Ed.2d 554 (1968), then the state judge is well within his power and, indeed is obliged by his oath, to grant relief for the double jeopardy violation. This illustrates well how the principles of comity are implicated by the en banc majority opinion. Under this Court's precedents, a 1982 federal district court could have granted relief through vacation of the attempted robbery conviction, whereas a state court could not—at least in the Eighth Circuit.

An alternative reading of the en banc majority opinion would be a federalization of the concept of "legal

satisfaction" of a state-court sentence. Apparently, the Eighth Circuit's en banc majority judges wish to become Missouri state-court judges when they write:

> We thus hold that the governor commuted Thomas's 15-year sentence, that Thomas served the commuted sentence for the attempted robbery, and thereby, under Missouri law, Thomas has satisfied the sentence for this offense.

Thomas v. Morris, 844 F.2d at 1340. Of course, implicitly, the state circuit court and Court of Appeals ruled that respondent had not "legally satisfied" his attempted robbery sentence when they ordered that sentence and conviction vacated. The en banc majority opinion does not discuss why its interpretation of state law is superior to the state courts'. It is the Missouri state courts that have the inherent expertise to interpret state law. Furthermore, the en banc majority opinion does not discuss why it has any right to reinterpret the concept of "legal satisfaction" of the sentence. The Eighth Circuit had no such right to reinterpret state law. *See, Ricketts v. Adamson*, ... U.S. ....., 107 S.Ct. 2680, 2684 n. 3, 97 L.Ed.2d 1 (1987).

Even if the concept of "legal satisfaction" of a sentence were a federal concept that would be entitled to *de novo* review in federal court, that federal concept would be interwoven with the state-law concept. It would be impossible to separate the state and federal concepts. It would be impossible to find a sentence "legally satisfied" for double jeopardy analysis, but not "legally satisfied" for state-law purposes. Of course, the en banc majority opinion did the impossible when it found the attempted robbery sentence was satisfied even though the state courts had not so found.

This Court's continued recognition of the state court's power to control its exercise of the police power is now, and will remain in the future, an important policy for this Court to protect. Furthermore, protection of the time-honored principles of comity avoid the anomalous result created by the majority en banc opinion. Circuit Judge Bowman's dissent accurately illustrates the "Alice through the Looking Glass" result when the en banc majority opinion ignores the fact that respondent received all the relief needed to cure the prior double jeopardy violation. The crux of the en banc majority opinion was that respondent had "legally satisfied" the judgment from the attempted robbery conviction. *See, Thomas v. Morris,* 844 F.2d at 1341. There can be no legal satisfaction of the sentence when the state's post-conviction court vacated that judgment and sentence in 1982. It is impossible to satisfy a judgment that is vacated. It is impossible to satisfy a judgment that no longer exists. Once the conviction for attempted robbery was vacated, the time served for that conviction was properly credited towards completion of the sentence for felony murder. Obviously, in this situation there is no multiple punishment for the same offense.

This Court recognized the fungible nature of time served towards completion of a sentence in *North Carolina v. Pearce*, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969). In *Pearce*, the Supreme Court interpreted the Double Jeopardy Clause to mandate that when resentencing is required following an appellate reversal and a new trial, time already served under the old sentence should be credited toward the new sentence. Accordingly, in the case at bar, when the attempted robbery conviction was vacated by the state trial court, the

time respondent had served on that conviction was credited towards completion of the felony murder sentence. There is no multiple punishment because the state post-conviction relief mechanism cured the double jeopardy violation.

The en banc majority opinion ruled that there was multiple punishment under the cases of *Ex parte Lange*, 85 U.S. (18 Wall.) 163, 21 L.Ed. 872 (1873), and *In re Bradley*, 318 U.S. 50, 63 S.Ct. 470, 87 L.Ed. 608 (1943). Those cases, however, are not dispositive. Those cases involved alternative punishments of imprisonment and fines. Both cases hold that when a fine is paid, the alternative punishment of imprisonment violates the Double Jeopardy Clause. Extension of *Lange* and *Bradley* to alternative sentences of imprisonment is unjustified. Obviously, the alternative sentences of fines and imprisonment in *Lange* and *Bradley* are not interchangeable. In the present case, alternative sentences of imprisonment are interchangeable. The sentences of imprisonment are fungible, as recognized by this Court in *North Carolina v. Pearce*. Respondent's double jeopardy rights were not violated when the attempted robbery conviction and sentence were vacated by the state court, with the time served credited towards completion of the life sentence for felony murder. The en banc majority opinion extended respondent's double jeopardy rights to an area prohibited by *North Carolina v. Pearce*.

Additionally, this Court has noted the significance of a legislature's intent in analyzing multiple punishment-double jeopardy claims. *See, Missouri v. Hunter*, 459 U.S. 359, 103 S.Ct. 673, 74 L.Ed.2d 535 (1983). In both *Lange* and *Bradley*, the objective intent of the legislatures and the judges was that the defendants serve one

of the alternative punishments. In those cases, the remedies fulfilled this objective intent. In respondent's case, the objective intent of the judge was that respondent serve at least a life sentence. In respondent's case, the objective intent of the Legislature was that respondent serve a life sentence. The Eighth Circuit's remedy, vacation of the murder conviction and life sentence, frustrates this intent. Only the remedy chosen by the state courts fulfilled this intent. *Lange* and *Bradley*, do not control this case.

Both the en banc majority opinion and the en banc dissenting opinion recognized the anomalous result of the majority's holding. The dissent by Judge Bowman articulates the public policy implications of the majority en banc holding. First, the Missouri Legislature, at the time of respondent's crime, intended that there be one punishment for the crime of felony murder. Respondent has not served that full term of imprisonment. The Legislature's intent is frustrated by the Eighth Circuit. Second, the sentencing judge intended that respondent serve at least life imprisonment. Again, the sentencing judge's intent has been frustrated by the Eighth Circuit's holding. This frustration is particularly egregious since the en banc majority decision depended upon the particular order in which the sentences were imposed. Respondent was sentenced to fifteen years for attempted robbery, with a consecutive life sentence for felony murder. Under the en banc majority analysis, respondent's double jeopardy claim would be baseless if the sentencing judge had simply reversed the order in which the prison sentences were to have been served. Furthermore, the claim would have been baseless if the sentences had run concurrently. The en banc majority opinion has turned

the serious sentencing process into a frivolous, whimsical game.

The original error in sentencing was made in good-faith reliance on existing 1974 Missouri law. The subsequent change in Missouri law in *State v. Olds, supra* (1980), and *State v. Morgan, supra* (1981), and the ensuing commutation (1981) of the attempted robbery sentence should not be available to respondent as a basis for nullifying the felony murder sentence. In vacating the attempted robbery sentence, the state post-conviction relief court vindicated what clearly would have been the intent of the sentencing court had the illegality of the double sentencing been apparent at the time of sentencing. The law in Missouri authorizes a life sentence for felony murder, and it is clear that the sentencing court intended that Thomas should serve a life sentence. The Eighth Circuit condemns the state court for fulfilling the Legislature's and sentencing judge's intents. That type of hypertechnical reasoning is what gives the practice of criminal law, especially appellate criminal law, a bad name.

Finally, the en banc majority result defies logic. Under the present sentencing order, respondent would suffer only one punishment: the life sentence for felony murder. That order corresponds to the intentions of the sentencing judge and the Missouri Legislature. This properly imposed conviction and sentence does not offend the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution. This Court should grant its writ of certiorari in order to resolve this important question of federalism. Upon its grant of certiorari, this Court should summarily reverse the judgment of the United States Court of Appeals for the Eighth Circuit, sitting en banc.

CONCLUSION

Petitioner respectfully requests that this petition for a writ of certiorari be granted and that the United States Court of Appeals for the Eighth Circuit's judgment be reversed.

Respectfully submitted,

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APPENDIX

(Entered June 9, 1988)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 85-1934-EM

Larry P. Thomas,
Appellant,
vs.
Terry Morris,
Appellee.

Appeal from the United States District Court for the Eastern District of Missouri

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Appellee's petition for rehearing en banc has been considered by the Court and is denied.

Petition for rehearing by the panel is also denied.

June 9, 1988

Order Entered at the Direction
of the Court:

/s/ Robert D. St. Vrain
Clerk, United States Court
of Appeals, Eighth Circuit

(Decided April 21, 1988)

Larry P. THOMAS,
Appellant,

v.

Terry MORRIS,
Appellee.

No. 85-1934.

United States Court of Appeals,
Eighth Circuit.

Submitted Sept. 14, 1987.
Decided April 21, 1988.

* * *

Before LAY, Chief Judge, HEANEY, McMILLIAN, ARNOLD, JOHN R. GIBSON, FAGG, BOWMAN, WOLLMAN and MAGILL, Circuit Judges.

McMILLIAN, Circuit Judge.

Larry P. Thomas appeals from a final judgment entered in the District Court for the Eastern District of Missouri dismissing his petition for writ of habeas corpus. On appeal a panel of this Court reversed and remanded the case to the district court for resentencing or a retrial within ninety days of the issuance of the decree. *Thomas v. Morris*, 816 F.2d 364, 371 (8th Cir.1987).[1] Both the State and Thomas petitioned this Court for a rehearing

1. The original panel opinion, *Thomas v. Morris*, 816 F.2d 364 (8th Cir.1987)[,] is withdrawn and vacated.

en banc and we granted the petitions. After further briefing and oral argument to the Court en banc, we now reverse the district court's judgment and remand to the district court with instructions to issue the writ in accordance with this opinion.

The relevant facts of the underlying offenses are not currently in dispute. On November 8, 1972, Thomas, during the course of a robbery of an auto parts store, engaged in a "shootout" with a customer, who subsequently died from the injuries received. Thomas was convicted of first degree felony murder and attempted robbery in the first degree by means of a dangerous and deadly weapon in a jury trial in St. Louis Circuit Court (the state trial court). On May 15, 1973, Thomas was sentenced to life imprisonment for the felony murder and fifteen (15) years['] imprisonment for the attempted robbery. The sentences were to be served consecutively and the 15-year sentence was to be served first. The Missouri Court of Appeals affirmed the conviction. *Thomas v. State*, 665 S.W.2d 621 (Mo.Ct.App.1983).

Thomas filed a Missouri Rule 27.26 motion for post conviction relief in 1977; this motion was denied. On appeal the Missouri Court of Appeals vacated the state trial court's dismissal of the Rule 27.26 motion and remanded the case for a new hearing on the grounds that the transcript on appeal did not include all the evidence adduced at the hearing. After an evidentiary hearing, the state trial court granted Thomas's motion in part and vacated the conviction for attempted robbery. The state trial court held that Thomas's convictions for attempted robbery and felony murder and separate consecutive sentences for the offenses, violated the [D]ouble [J]eopardy [C]lause, [sic] because the Missouri legislature

did not intend to allow separate and consecutive punishments for felony murder and the underlying felony. The state trial court left intact Thomas's felony murder conviction and life sentence.

In June 1981 Thomas's 15-year sentence for attempted robbery was commuted by the governor. Thomas had begun serving this sentence on June 28, 1973, and thus had served approximately eight years of the 15-year sentence. On June 24, 1982, one year after the commutation by the governor, the state trial court vacated the 15-year sentence and credited the time Thomas had served prior to the court's vacation of the 15-year sentence, [sic] to his life sentence for felony murder. The Missouri Court of Appeals affirmed the state trial court's decision. *Thomas v. State*, 665 S.W.2d 621, 625 (Mo.Ct.App.1983).

DISTRICT COURT PROCEEDINGS

On August 1, 1984, Thomas filed a petition for a writ of habeas corpus in federal district court pursuant to 28 U.S.C. § 2254. He contended that his confinement as a result of the life sentence violated the [D]ouble [J]eopardy [C]lause. The matter was referred to a magistrate, who recommended that the writ be issued because Thomas had completed the 15-year sentence for the attempted robbery. *Thomas v. Morris*, No. 84-1760 C (5), slip op. at 11 (E.D.Mo. March 29, 1985). The magistrate concluded that the state trial court did not have jurisdiction to vacate the 15-year sentence and to cause Thomas to serve the life prison sentence for the same conviction.

On June 28, 1985, the district court rejected the magistrate's recommendation. Relying on *Missouri v. Hunter*, 459 U.S. 359, 366, 103 S.Ct. 673, 678, 74 L.Ed.2d

535 (1983), the district court held that with respect to cumulative sentences imposed in a single trial, the "double jeopardy clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended." *Thomas v. Morris*, No. 84-1760 C (5), slip op. at 3 (E.D.Mo. June 28, 1985). The court held that Thomas was not being subjected to greater punishment than the legislature intended because "the entire time he served for the attempted robbery sentence was duly credited to his life sentence on the felony murder conviction." *Id.*

PANEL DECISION

The majority of the panel in three separate opinions reversed the judgment of the district court and remanded the case for resentencing or retrial within ninety days of the issuance of the opinion. *Thomas v. Morris*, 816 F.2d at 371. Two members of the panel, Judges McMillian and Hanson,[2] agreed that Thomas had legally satisfied the sentence he received for the attempted robbery and that the subsequent vacation of that sentence and his continued confinement under the felony murder conviction violated the [D]ouble [J]eopardy [C]lause, but could not agree on the remedy necessary to correct the double jeopardy violation. *Id.* at 367 (majority opinion). Additionally, Judge Bowman did not believe that a double jeopardy violation had occurred. *Id.* at 372 (Bowman, J., dissenting in part). Nonetheless, he joined with Judge Hanson in holding that any double jeopardy violation which had occurred could be corrected by either resen-

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2. The Honorable William C. Hanson, United States Senior District Judge for the Northern and Southern Districts of Iowa, sitting by designation.

tencing or retrial. *Id.* at 371. They relied on the Supreme Court's decision in *Morris v. Mathews*, 475 U.S. 237, 106 S.Ct. 1032, 89 L.Ed.2d 187 (1986), which held that reducing a defendant's concededly jeopardy-barred conviction for aggravated murder to a conviction for murder that was not jeopardy-barred was an adequate remedy for the double jeopardy violation. *Morris v. Mathews*, 475 U.S. at 244-48, 106 S.Ct. at 1037-39. Judges Hanson and Bowman concluded that the state court judge in the present case could correct the double jeopardy problem by changing the jeopardy-barred felony murder conviction to a non-jeopardy-barred lesser included offense of murder. The state trial court then could sentence Thomas on the offense of murder unless Thomas was able to "demonstrate a reasonable probability that he would not have been convicted of the non-jeopardy-barred offense absent the presence of the jeopardy-barred offense." *Thomas v. Morris*, 816 F.2d at 371 (citing *Morris v. Mathews*, 475 U.S. at 247, 106 S.Ct. at 1038). If Thomas could show prejudice resulting from the inclusion of the felony murder charge[,] he would be entitled to a new trial on the non-jeopardy-barred murder offense. *Thomas v. Morris*, 816 F.2d at 371. Judge McMillian, in a separate concurring and dissenting opinion, held that the double jeopardy violation could not be cured either by resentencing or retrying Thomas on the lesser included offense of murder[,] and thus[,] Thomas should be granted habeas corpus relief. *Id.* (McMillian, J., concurring in part and dissenting in part).

REHEARING EN BANC

Both Thomas and the State filed petitions for rehearing en banc and supplemental briefs. The State

argues that the panel decision is contrary to the holdings of several Eighth Circuit and Supreme Court decisions which permitted courts to impose a single sentence where illegal multiple sentences had been imposed. Thomas also asserts that the court's sentence is in opposition to prior decisions of the Supreme Court, *In re Bradley*, 318 U.S. 50, 63 S.Ct. 470, 87 L.Ed. 608 (1943), *Ex parte Lange*, 85 U.S. (18 Wall.) 163, 21 L.Ed. 872 (1873), and decisions of this Court, *Holbrook v. United States*, 136 F.2d 649 (8th Cir.1943). Thomas contends that the cases relied on by the State are distinguishable from the present case because in those cases the defendant had not completely satisfied one of the illegally imposed multiple sentences.

We begin our analysis, as the panel did, by considering whether Thomas had fully satisfied the 15-year sentence for the attempted robbery conviction prior to the vacation of that sentence by the state trial court. The State argues now, as it did before, that Thomas had not completed his 15-year sentence for attempted robbery at the time the sentence was vacated. The State concedes that Thomas had completed the commuted sentence, but argues that the commutation of the 15-year sentence merely changed Thomas's punishment from 15 years plus life to a less severe punishment of a life sentence only.

We cannot agree with the State's reading of the commutation. The commutation refers only to the 15-year sentence and expressly commutes this sentence. The commutation neither refers to a substitution of one sentence for another nor is there any [sic] mention in the commutation document of either the felony murder conviction or the life sentence. The State has offered no evidence which calls into question the plain language of the com-

mutation or otherwise supports the State's theory that the life sentence was substituted for the 15-year sentence. We thus hold that the governor commuted Thomas's 15-year sentence, that Thomas served the commuted sentence for the attempted robbery, and thereby, under Missouri law, Thomas has satisfied the sentence for this offense. *See State v. Cerny*, 248 S.W.2d 844, 845 (Mo. 1952). We next consider whether the state court's subsequent vacation of the 15-year sentence for attempted robbery and Thomas's continuing confinement under the life sentence on the felony murder conviction violated the [D]ouble [J]eopardy [C]lause. This issue has not been addressed by this [C]ourt[,] but other courts have decided cases which are factually similar. The Supreme Court[,] in *Ex parte Lange*, 85 U.S. (18 Wall.) 163, 21 L.Ed. 872 (1873) (*Lange*), held that the [D]ouble [J]eopardy [C]lause prohibits multiple punishments for the same offense.

In *Lange*, the defendant had been found guilty of stealing mail bags and had been sentenced to one year imprisonment and a $200.00 fine. The applicable statute provided that the maximum punishment was imprisonment of one year *or* a $200.00 fine. The defendant paid the fine and served five days of the sentence before his habeas corpus petition was heard. The sentencing judge attempted to correct the error by entering an order vacating the prior judgment and resentencing the defendant to one year in jail from the date of the resentencing. *Lange*, 85 U.S. (18 Wall.) at 164. The Supreme Court held that the district court had violated Lange's constitutional rights by sentencing him to one year imprisonment *and* requiring him to pay the fine. The Court further held that the district court could no longer vacate the sentence and resentence him after Lange had paid the fine. *Id.* "When

the prisoner . . . by reason of a valid judgment, had fully suffered one of the alternative punishments to which alone the law subjected him, the power of the court to punish further was gone." *Id.* at 176.

Lange was the first case to hold that the [D]ouble [J]eopardy [C]lause prohibits multiple punishments for the same offense. The *Lange* court explained that such a prohibition was necessary to give meaning to the prohibition, recognized prior to this time, that a defendant could not be prosecuted a second time for an offense.

> For of what avail is the constitutional protection against more than one trial if there can be any number of sentences pronounced on the same verdict? . . . [I]f, after judgment has been rendered on the conviction, [sic] and the sentence of that judgment executed on the criminal, he can be again sentenced on that conviction to another and different punishment, or to endure the same punishment a second time, is the constitutional restriction of any value? . . . [T]he Constitution was designed as much to prevent the criminal from being twice punished for the same offense as from being twice tried for it.

Id. at 173.

Seventy years later, the Supreme Court[,] in *In re Bradley*, 318 U.S. 50, 63 S.Ct. 470, 87 L.Ed. 608 (1943) (*Bradley*)[,] reaffirmed its decision in *Lange*. In *Bradley*, the defendant had been sentenced to six months[']' imprisonment and a fine of $500.00, although the applicable statute only permitted a fine *or* imprisonment. On September 28, 1942, Bradley was taken into custody and committed to prison. On October 1, 1942, Bradley's attorney paid the fine in cash to the clerk of the court.

Later on the same day, the court realized that the sentence was erroneous and amended the sentence by omitting the fine. The court clerk was instructed to return the money, however, Bradley refused to accept it. The Supreme Court held that the attempt to amend the sentence was a nullity because there had been a full satisfaction of one of the alternative penalties permitted by the statute. *Bradley*, 318 U.S. at 52, 63 S.Ct. at 471. "As the judgment of the court was thus executed so as to be a full satisfaction of one of the alternative penalties of the law, the power of the court was at an end. . . . Since one valid alternative provision of the original sentence has been satisfied, the petitioner is entitled to be freed of further restraint." *Id.* at 52, 63 S.Ct. at 471.

Similarly, the Ninth Circuit[,] in *United States v. Edick*, 603 F.2d 772 (9th Cir.1979) (*Edick*), held that a court lacks authority to impose a second consecutive sentence after the defendant has served one sentence for the offense. Edick was convicted on a two-count indictment of possession of an unregistered sawed-off shotgun in violation of 26 U.S.C. § 5861(d) and of possession of the same firearm not identified by serial number in violation of 26 U.S.C. § 5861(i). Although the Ninth Circuit, in *United States v. Clements*, 471 F.2d 1253 (9th Cir.1972), and prior to *Edick*, had held that consecutive sentences could not be imposed for different counts arising from a single transaction violating different provisions of 26 U.S.C. § 5861, the district court sentenced Edick to imprisonment for three years on Count one and five years on Count two. The five-year sentence was suspended and Edick was placed on probation for five years; probation was to commence after Edick served the three[-]year prison term. The three[-]year prison term was later "reduced to time served as of June 15, 1976."

Approximately two years after Edick's release from custody, the district court revoked his probation for violation of the conditions of probation and imposed a new sentence of three years[']imprisonment on [c]ount two. The Ninth Circuit, relying in part on this Court's decision in *Holbrook v. United States*, 136 F.2d 649 (8th Cir.1943) (*Holbrook*), concluded that "the district court lost the power to resentence Edick on count two once he had satisfied his sentence on count one." *Edick*, 603 F.2d at 778; *but see Rollins v. United States*, 543 F.2d 574, 575 (5th Cir.1976) (per curiam) (sentence vacated and remanded for resentencing although defendant had served one of the two sentences for violations of separate provisions of 26 U.S.C. § 5861).

Most recently[,] after the panel decision in the present case, the Fifth Circuit in *United States v. Holmes*, 822 F.2d 481 (5th Cir.1987) (*Holmes*), decided a case very similar to *Lange*. Pursuant to a plea agreement with the government, the defendant pleaded guilty to an information charging him with contempt and the government agreed to dismiss the indictment charging other offenses. On the same day the defendant filed a waiver of indictment, the court allowed the information to be filed, accepted defendant's plea of guilty, and entered the judgment of guilty on the defendant's plea. On December 11, 1985 (approximately six months after the plea was entered)[,] the court imposed a sentence of a $10,000.00 fine and one year in prison. On the same day the defendant tendered the $10,000.00 in full to the deputy clerk of the district court[,] which [fine] the clerk accepted. The defendant also paid the $50.00 special assessment imposed by the court. Six days later, on December 17, 1985, the defendant filed a Rule 35(a) motion to vacate[,] as illegal,

that part of his sentence ordering imprisonment. The district court denied the motion and the defendant appealed. *Holmes*, 822 F.2d at 484-85.

The Fifth Circuit held that the defendant had been charged in the information with only one offense although the information specified three acts undertaken by the defendant to accomplish the offense, and the applicable statute authorized either a fine or imprisonment. *Holmes*, 822 F.2d at 495. The court concluded that the defendant's payment of the $10,000.00 fine was full satisfaction of one of the sentences imposed[,] and thus, the imposition of the second sentence of imprisonment was in violation of the [D]ouble [J]eopardy [C]lause. *Id.* at 498-99.

The critical factor in the cases discussed above is that the defendant had legally satisfied one of the illegally imposed multiple sentences. In the cases relied on by the State[,] the defendant had not legally satisfied one of the sentences. This Court[,] in *Holbrook*, relied on by the Ninth Circuit in *Edick*, similarly held that the district court had the option of vacating either of two sentences improperly imposed only "up to the time there has been a legal satisfaction of one of the sentences." *Holbrook*, 136 F.2d at 652. *Holbrook* had received consecutive sentences of twenty (20) years['] and five (5) years['] imprisonment under a federal bank robbery statute, although the statute did not permit multiple punishments for violation of several provisions of the statute. *Id.* Relying on *Lange* and *Bradley*, Holbrook contended that he was entitled to be released because he had served more than five years, the length of one sentence. This Court held that Holbrook had not completely served either the 5-year sentence or the 20-year sentence because the 20-year sentence was to be served before the 5-year sentence. Consequently, the district court still had the power to correct the illegal sentence by vacating the 5-year sentence and permitting the 20-year sentence to stand. *Id.; see also Hardy v. United States*, 292 F.2d 192, 194 (8th Cir.1961).

We believe that the panel majority failed to make this important distinction in its determination that *Morris v. Mathews* permits the double jeopardy violation to be cured by "changing the jeopardy-barred felony murder conviction to a non-jeopardy-barred lesser included offense." *Thomas v. Morris*, 816 F.2d at 371. The defendant in *Morris v. Mathews* was first convicted of a charge of aggravated robbery. Subsequently, he was also convicted of a charge of felony murder when the State discovered he had committed a homicide along with the robbery. *Morris v. Mathews*, 475 U.S. at 241, 106 S.Ct. at 1035. The Supreme Court held the two convictions violated the [D]ouble [J]eopardy [C]lause. *Id.* at 244, 106 S.Ct. at 1037. The Court concluded, however, that the jury had implicitly found the defendant guilty of the lesser included offense of murder, which was not jeopardy-barred. The Court, therefore, held that modifying the felony murder conviction to a conviction for the lesser included offense of murder would cure the double jeopardy violation, so long as the defendant could not demonstrate prejudice from being charged with the felony murder offense. *Id.*

The critical difference between *Mathews* and the present case is that the defendant in *Mathews* had not fully satisfied either the sentence for the aggravated robbery or the sentence for the felony murder. In the present case[,] Thomas had fully satisfied the sentence for the attempted robbery. This same important distinction runs through the cases of *Lange, Bradley, Edick, Holmes,*

and *Holbrook*, a distinction which we find determinative here.

The State lastly argues that the present case is distinguishable from *Lange* and *Bradley* because those cases dealt with multiple punishments of a different quality, imprisonment and a fine. The State cites no authority, and we believe there is none, for the proposition that the [D]ouble [J]eopardy [C]lause permits multiple punishments of a similar quality for the same offense. In summary, we hold that Thomas had legally satisfied the 15-year sentence for the attempted robbery and that his continued confinement for the felony murder offense violated his double jeopardy rights. Thus, we reverse the judgment of the district court and remand the case to the district court with instructions to issue the writ of habeas corpus in accordance with this opinion.

BOWMAN, Circuit Judge, with whom GIBSON, FAGG and WOLLMAN, Circuit Judges, join, dissenting.

I dissent from the holding of the Court that the [D]ouble [J]eopardy [C]lause has been violated in this case. The result of the Court's decision is that Thomas, who was convicted of attempted robbery and felony murder and originally sentenced to consecutive prison terms of fifteen years and life, will be released immediately, having served only seven years of his fifteen-year sentence on the attempted robbery conviction. He will go free on the basis of a series of fortuitous events. Because the governor commuted Thomas's attempted robbery sentence before the state trial court was able to vacate it in accordance with the holding (several years after Thomas's conviction) of the Missouri Supreme Court in *State v. Morgan*, 612 S.W.2d 1 (Mo.1981) (en banc) (prohibiting imposition of sentences on both felony murder and the

underlying felony), the Court finds that Thomas cannot be required to serve the life sentence on his felony murder conviction.[1] I respectfully disagree.

In vacating the felony murder sentence because Thomas has served the commuted sentence for attempted robbery, the Court relies upon dicta in *Holbrook v. United States*, 136 F.2d 649, 652 (8th Cir.1943), which suggests that if one of two consecutive sentences has been served, and the Court must vacate one of those sentences, then *Ex parte Lange*, 85 U.S. (18 Wall.) 163, 21 L.Ed. 872 (1873), controls and requires the uncompleted sentence to be vacated and the prisoner to be released. I disagree with the dicta in *Holbrook* and find the Court's reliance on *Lange* and *In re Bradley*, 318 U.S. 50, 63 S.Ct. 470, 87 L.Ed. 608 (1943)[,] to be misplaced.[2]

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1. Under today's decision, Thomas effectively slips through a judicially manufactured crack in the criminal justice system, even though his early release contravenes not only the intent of the sentencing court, but also the intent of the Missouri legislature as expressed in the current statutory punishment for felony murder. In 1984, the Missouri legislature revised the statutory treatment of felony murder, with the result that *State v. Morgan*, and *State v. Olds*, 603 S.W.2d 501 (Mo. 1980) (en banc), which looked to legislative intent to determine that the [D]ouble [J]eopardy [C]lause was offended by the imposition of sentences for both felony murder and the underlying felony, are no longer a [sic] valid statement[s] of that intent. Murder in the second degree, of which felony murder is one example, is now classified as "a class A felony, and the punishment for second degree murder shall be in addition to the punishment for commission of a related felony or attempted felony, other than murder or manslaughter." Mo.Rev.Stat. § 565.021(2) (Supp.1984). Thus, if Thomas were convicted today, and the same sentences were imposed, then under *Whalen v. United States*, 445 U.S. 684, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980), the Court would have to find that the [D]ouble [J]eopardy [C]lause had not been violated. Thomas's sentences for both attempted robbery and felony murder would stand.

2. Indeed, the concurring opinion in *Holbrook* notes that up to that time, no circuit [courts] of appeals had found *Lange* to

(Continued on following page)

In both *Lange* and *Bradley*, the sentencing court simultaneously imposed both a fine and imprisonment for a single offense, although at the time of sentencing only one of those two alternative punishments could properly be imposed under the applicable statute. By the time the sentencing judge discovered his mistake, the defendant already had paid the fine. Because the nature of the alternative punishments was different, and because the fine and imprisonment were unauthorized cumulative punishments for a single statutory offense, the Supreme Court held in each case that the [D]ouble [J]eopardy [C]lause was implicated. As the Court noted in *Lange*, reimposition of the year-long prison sentence following payment of the fine and five days in jail would result in more punishment than was authorized by statute. It stated:

> The court, through inadvertence, imposed both punishments, [sic] when it could rightfully impose but one. After the fine was paid and passed into the treasury, and the petitioner had suffered five days of his one year's imprisonment, the court changed its judgment by sentencing him to one year's imprisonment from that time. If this latter sentence is enforced[,] it follows that the prisoner in the end pays his two hundred dollars [sic] fine and is imprisoned one year and five days, being all that the first judgment imposed on him and five days' imprisonment in addition. And this is done because the first judgment was confessedly in excess of the authority of the court.

85 U.S. (18 Wall.) at 175.

Footnote continued—

be applicable beyond its narrow facts, i.e., in the situation of "statutory alternative sentences" for the same offense. *Holbrook*, 136 F.2d at 653 (Stone, J., concurring). This is not such a case. Rather, it is a case in which Thomas was sentenced for two separate offenses, with the Missouri Supreme Court deciding[—] long after the fact[—]that he could be sentenced for one or the other, but not both.

The circumstances surrounding Thomas's conviction and sentencing are far different from those in *Lange* and *Bradley*. The illegality in the [S]tate of Missouri of imposing two sentences when a defendant has been convicted of both felony murder and an underlying felony was not established until 1981. Thomas was sentenced in 1973. At that time, the sentencing court could not possibly have known that its imposition of a sentence for each conviction would later be found unlawful. Moreover, the two sentences were not alternative statutory punishments for one offense. Rather, they were two separate statutory punishments for two separate offenses. Finally, the two punishments were of the same nature—imprisonment—and thus were interchangeable, whereas the punishments in *Lange* and *Bradley* were not.[3]

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3. These factors also distinguish the present case from *United States v. Holmes*, 822 F.2d 481 (5th Cir.1987), in which the statute under which the defendant had pleaded guilty authorized either a fine or imprisonment, but not both.

United States v. Edick, 603 F.2d 772 (9th Cir.1979), is similarly distinguishable from the present case, since in *Edick* the punishments imposed were alternative statutory punishments and were not interchangeable. Edick was sentenced to imprisonment for three years on Count I and to a consecutive five[-]year term of probation on Count II. The Ninth Circuit stated:

> Here, the trial court's error was to subject Edick to two punishments when . . . only one was authorized. Either prison time or probation was valid under the statutory alternatives, but, to avoid an illegal cumulation of punishment, the sentences had to be imposed concurrently. Manifestly, prison time and probation cannot be served concurrently.

Id. at 777.

The [D]ouble [J]eopardy [C]lause "protects against multiple punishments for the same offense." *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S.Ct. 2072, 2076, 23 L.Ed.2d 656 (1969). In *Pearce*, the Supreme Court interpreted this language to mandate that, when resentencing is required following a new trial, time already served under the old sentence [should] be credited toward the new sentence. The state trial court's order in the present case, vacating the attempted robbery sentence and crediting the time already served thereunder toward the life sentence for felony murder, is responsive to Thomas's claim that he cannot be twice punished for the same offense. In accordance with *State v. Morgan*, Thomas is serving only the sentence imposed on one of his two original convictions. Thomas's felony murder sentence is not increased by this order, and the result is in accord with the holding in *Pearce*. Thomas correctly asserts that the [D]ouble [J]eopardy [C]lause prohibits the State from requiring him to serve both sentences. However, the [D]ouble [J]eopardy [C]lause does not require that Thomas be given the choice of which of two simultaneously imposed prison sentences he is to serve when it transpires that he cannot be made to serve both.[4]

The Court's double jeopardy holding in the present case, when viewed together with earlier Eighth Circuit precedent, produces strangely anomalous results. First,

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4. The Fifth Circuit has held accordingly, remanding the case for vacation of the shorter of two consecutive sentences after it had been fully served. *Rollins v. United States*, 543 F.2d 574 (5th Cir.1976); *cf. United States v. Hodges*, 628 F.2d 350, 353 (5th Cir.1980) ("This Court has consistently held that resentencing to the maximum penalty authorized by law is permitted when the aggregate of the illegally imposed consecutive sentences equals or exceeds the maximum for which the court lawfully could have sentenced the defendant.").

in today's holding the Court ignores Eighth Circuit precedent establishing that the intention of the sentencing judge is the determinative factor in deciding which of two sentences to vacate when both sentences cannot stand together. *Jones v. United States*, 396 F.2d 66, 69 (8th Cir.1968), *cert. denied*, 393 U.S. 1057, 89 S.Ct. 695, 21 L.Ed.2d 697 (1969); *Sawyer v. United States*, 312 F.2d 24, 27-29 (8th Cir.), *cert. denied*, 374 U.S. 837, 83 S.Ct. 1888, 10 L.Ed.2d 1058 (1963); *see also United States v. Pietras*, 501 F.2d 182, 188 (8th Cir.), *cert. denied*, 419 U.S. 1071, 95 S.Ct. 660, 42 L.Ed.2d 668 (1974). Today's holding dictates that decisive weight be placed upon the order in which the sentences were imposed; *i.e.*, that the sentencing judge first sentenced Thomas on Count I to a 15-year term for attempted robbery, and thereafter on Count II to a consecutive life sentence for felony murder. Under the Court's analysis, Thomas's claim of double jeopardy would be baseless if the sentencing judge had simply reversed the order in which the prison sentences were to be served. *See Holbrook*, 136 F.2d at 652. Surely the question of whether a convicted murderer is to serve the life term that the sentencing authority plainly intended he was to serve should not be decided on a basis so essentially whimsical. As the Supreme Court remarked in *Bozza v. United States*, 330 U.S. 160, 166-67, 67 S.Ct. 645, 648-49, 91 L.Ed. 818 (1947), "The Constitution does not require that sentencing should be a game in which a wrong move by the judge means immunity for the prisoner." The Court also rejected the sporting game approach to double jeopardy in *Green v. United States*, 365 U.S. 301, 81 S.Ct. 653, 5 L.Ed.2d 670 (1961). In *Green*, the defendant argued that, [sic] when the trial court imposed two sentences for the same offense, the court lost its power to sentence further once it had issued the

first sentence, [sic] and[,] therefore[,] that only the first, shorter sentence was valid. The Court responded that it was the intention of the trial judge and not the order of sentencing that was to govern:

> Although petitioner is technically correct that sentences should not have been imposed on both counts, the remedy which he seeks does not follow. This is not a case where sentence was passed on two counts stating alternative means of committing one offense; rather, the third count involved additional characteristics which made the offense an aggravated one—namely, putting persons in jeopardy of life by use of a dangerous weapon. Plainly enough, the intention of the district judge was to impose the maximum sentence of twenty-five years for aggravated bank robbery, and the formal defect in his procedure should not vitiate his considered judgment.

365 U.S. at 306, 81 S.Ct. at 656.

I believe that similar logic applies in the present case. The original error in sentencing Thomas was made in good[-]faith reliance on existing Missouri law. The subsequent change in Missouri law and the ensuing commutation of the attempted robbery sentence should not be available to Thomas as a basis for nullifying the felony murder sentence. In vacating the attempted robbery sentence, the state trial court vindicated what clearly would have been the intent of the sentencing court had the illegality of the double sentencing been apparent at the time of sentencing. The law of Missouri authorizes a life sentence for felony murder[,] and it is clear that the sentencing court intended that Thomas should serve a life sentence. In these circumstances, it is little short of preposterous that the sequence in which the consecutive

sentences were pronounced should provide a basis for Thomas's early release.

The extreme hypertechnicality of today's decision is illustrated further by the point that had Thomas been sentenced to concurrent, rather than consecutive, sentences of fifteen years and life imprisonment, commutation of the fifteen-year sentence would not provide a basis for his early release on double jeopardy grounds. In keeping with *United States v. Leather*, 271 F.2d 80 (7th Cir. 1959), *cert. denied*, 363 U.S. 831, 80 S.Ct. 1602, 4 L.Ed.2d 1525 (1960), this Circuit held in *Hardy v. United States*, 292 F.2d 192 (8th Cir.1961), that completion of the shorter of two concurrent sentences does not excuse the prisoner from serving the longer of those sentences when one of them must be invalidated[, t]he Court stated:

> [T]he right of the court in such a situation to simply vacate the shorter sentence and allow the longer one to stand has been recognized. Appellant argues, however, that here his 10-year sentence had been served, so that there was no right to vacate it, and that[,] consequently[,] only the 20-year sentence was capable of being set aside. A similar situation and contention were involved in *United States v. Leather* . . . where the court held that the longer sentence standing on the record would legally constitute the measure or the term of the punishment in the situation, [sic] unless the trial court saw fit to vacate it, [sic] and that the shorter concurrent sentence thus would, while the two sentences stood together, have incidence only in relation to this controlling measure or term of his punishment. The court accordingly upheld the right of the trial court in that case, as here, to vacate the shorter

> sentence, [sic] even though the defendant had by that time been confined for a period equal to its length. . . . We are in agreement with the *Leather* case.

Id. at 194-95. In today's decision, the Court fails to offer any coherent reason for its conclusion that the consecutive[,] rather than concurrent[,] nature of Thomas's prison sentences breathes life into a double jeopardy claim that otherwise would have been dead on arrival.

In addition, the Court's decision brings about yet another anomalous result. When one of two prison sentences must be vacated, [sic] and the shorter of the two already has been served, today's decision has the unfortunate result of stripping the sentencing judge of authority to determine which sentence to vacate when the sentences are consecutive, while leaving the sentencing judge with such authority unfettered when the sentences are concurrent. This result defies logical explanation. The more serious crimes deserve more severe punishment, and, [sic] as a general proposition, the more reprehensible the crimes, the more likely it is that the sentencing judge will impose consecutive prison sentences on the separate counts of which the defendant is convicted. The Court offers no constitutional theory to justify the anomaly it thus creates.

I believe that release of Thomas on double jeopardy grounds is not required by either Supreme Court precedent or the law of this Circuit, much less by the language of the [D]ouble [J]eopardy [C]lause itself. Release of a prisoner properly convicted of both attempted robbery and felony murder after service of only the sentence on the attempted robbery conviction removes logic and

judicial control from the sentencing process. Plainly, if the decision in *State v. Morgan* had been handed down before Thomas's sentencing, the sentencing court would have sentenced him on the more serious of the two convictions and would have imposed only the life sentence for the felony murder. This is not, as in *Lange*, a situation in which the judge, having clear precedent or statutory guidance before him, mistook his authority to impose cumulative sentences. Instead, this is a case in which the law changed long after the sentencing occurred. Thomas seeks to take advantage of that change and to gain his early release on the basis of an argument that mocks and trivializes the [D]ouble [J]eopardy [C]lause's important purpose of preventing multiple punishments for a single crime. Under the sentencing order to which Thomas presently is subject, he would suffer only one punishment: the life sentence for felony murder. The time he already has served on the fifteen-year sentence for attempted robbery would count toward his completion of the life sentence. He therefore would serve in total not one day more than the period of confinement that a life sentence entails. I cannot agree that requiring him to serve this properly imposed sentence offends the [D]ouble [J]eopardy [C]lause. Accordingly, I would affirm the order of the District Court.

In addition, I continue to believe that, [sic] if a double jeopardy violation is found, the prosecution should be afforded an opportunity to cure the violation by returning to the state trial court for proceedings consistent with *Morris v. Mathews*, 475 U.S. 237, 106 S.Ct. 1032, 89 L.Ed. 2d 187 (1986). I will not repeat here what already has been said on this matter in the panel opinion. *See Thomas v. Morris*, 816 F.2d 364, 370-71 (8th Cir.1987).

(Decided April 3, 1987)

Larry P. THOMAS,
Appellant,

v.

Terry MORRIS,
Appellee.

No. 85-1934.

United States Court of Appeals,
Eighth Circuit.

Submitted March 11, 1986.
Decided April 3, 1987.

* * *

Before McMILLIAN and BOWMAN, Circuit Judges, and HANSON,* Senior District Judge.

HANSON, Senior District Judge.

Thomas appeals the district court's dismissal of his habeas corpus petition, asserting that a trial court's vacation of his previously commuted sentence is an inadequate remedy for the double jeopardy violation he suffered. He alleges that his continued confinement under a related sentence subjects him to further violation of the [D]ouble [J]eopardy [C]lause. For the reasons discussed below, we reverse the district court's decision and remand in accordance with our opinion.

*The HONORABLE WILLIAM C. HANSON, United States Senior District Judge for the Northern and Southern Districts of Iowa, sitting by designation.

I.

Thomas was convicted of first degree felony-murder and of attempted robbery in the first degree by means of a dangerous and deadly weapon in a jury trial in the Circuit Court of the City of St. Louis. On May 25, 1973, Thomas was sentenced to a fifteen-year sentence for the attempted robbery, [sic] and to a term of life imprisonment for the felony-murder. The sentences were ordered to be served consecutively, beginning with the fifteen-year sentence. Appellant began serving this sentence on June 28, 1973. The convictions were affirmed by the Missouri Court of Appeals on February 11, 1975. *State v. Thomas*, 522 S.W.2d 74, 77 (Mo.App.1975).

Following this affirmation, appellant Thomas collaterally attacked the judgment by filing a Missouri Supreme Court Rule 27.26 motion in state court. The motion was initially dismissed by the state court, but later the Missouri Court of Appeals vacated the dismissal and remanded the cause to the circuit court for a new hearing. On March 27, 1981, appellant's attorney amended the Rule 27.26 motion by adding a double jeopardy claim.

In June of 1981, then Missouri Governor Christopher S. Bond commuted appellant's fifteen-year sentence. One year later, on June 24, 1982, the circuit court vacated the fifteen-year sentence and the conviction for attempted robbery. The court held that the combination of the attempted robbery conviction and the felony murder conviction violated the [D]ouble [J]eopardy [C]lause. All of the time Thomas had served prior to the court's vacation was credited toward the remaining life sentence. The Missouri Court of Appeals affirmed the circuit court's decision. *Thomas v. State*, 665 S.W.2d 621, 625 (Mo. App.1983).

Thomas then filed a petition for a writ of habeas corpus in federal court pursuant to 28 U.S.C. § 2254. He asserted that his continued confinement under the life sentence for the conviction of first degree felony-murder was unconstitutional under the [D]ouble [J]eopardy [C]lause. United States Magistrate Robert Kingsland issued a recommendation that the writ of habeas corpus be granted. It was the opinion of the Magistrate that because Thomas had "fully satisfied one sentence, the state court was without power to vacate the same sentence and cause petitioner to serve life imprisonment for the same conviction." *Thomas v. Morris,* No. 84-1760 C(5), slip op. at 11 (E.D.Mo. March 29, 1985).

This recommendation was rejected by the United States District Court for the Eastern District of Missouri on June 28, 1985, in an order by the Honorable Stephen N. Limbaugh. The court denied the habeas petition, holding that the "Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended." *Thomas v. Morris,* No. 84-1760 C(5), slip op. at 3 (E.D.Mo. June 28, 1985). The court ruled that Thomas was "not being subjected to greater punishment than the legislature intended" because "the entire time he served for the attempted robbery sentence was duly credited to his life sentence on the felony murder conviction." *Id.*

Thomas filed an appeal with this [C]ourt, requesting it to issue a judgment ordering the United States district court to issue its writ of habeas corpus. The appeal is based on the alleged double jeopardy violation outlined above[,] as well as on a claim that the circuit court's vacation of the previously commuted sentence acted as an ex post facto law in violation of the [D]ue [P]rocess

[C]lause of the [F]ourteenth [A]mendment. The record before this court does not indicate whether the ex post facto claim was part of the habeas claim presented to the district court, and therefore[,] we shall not consider it.

II.

The first step in analyzing Thomas'[s] claim is to determine if he had fully satisfied the fifteen-year sentence for the attempted robbery conviction prior to the vacation of that sentence by the circuit court. For, [sic] if he had not, it is clear from this [C]ourt's ruling in *Holbrook v. United States* that the circuit court had "the right to say which of the two consecutive sentences, contemporaneously imposed and both unexecuted[,] shall be eliminated in order not to subject the defendant to . . . double punishment." 136 F.2d 649, 652 (8th Cir.1943). Thus, unless the sentence was satisfied, there is no double jeopardy violation.

The determinative factor in deciding whether Thomas had fully satisfied the fifteen-year sentence is the legal effect of the commutation of sentence issued in June of 1981. Thomas asserts that under the terms of the commutation[,] he had completed serving his fifteen-year sentence on June 16, 1981—one year prior to the vacation of the sentence by the circuit court.

Appellee Morris, on the other hand, asserts that when Governor Bond commuted the sentence[,] he was merely changing Thomas'[s] punishment from fifteen years plus life to a less severe punishment of a life sentence only. Therefore, according to Morris, Thomas never fully completed the fifteen-year sentence because the commutation merely substituted the punishment of life imprisonment for the original two sentences.

The district court below did not make any rulings as to the legal effect of the commutation, apparently under the false impression that this factor had no significance. Fortunately, however, this [C]ourt has a true and complete copy of the commutation in the record. The relevant language of the commutation reads:

> Whereas Larry Thomas . . . was . . . convicted of the crime of . . . ATTEMPTED ROBBERY FIRST DEGREE BY MEANS OF DDW, . . ., I, CHRISTOPHER S. BOND, Governor of the State of Missouri, by virtue of authority in me vested and for good and sufficient reasons, do hereby commute the sentence of the above mentioned recipient hereof, to a term ending June 16, 1981.

The commutation was signed on June 12, 1981. There is no mention in the document of either the felony-murder conviction or the life sentence appellant received pursuant to it.

It is difficult, in light of the language contained in this document, to find any merit in appellee's assertion that the commutation was a substitution of one sentence for the two sentences. The commutation lacks any indication that this was the case. Instead, it refers only to the attempted robbery conviction and the associated fifteen-year sentence and unambiguously commutes this sentence to a term "ending" on June 16, 1981.

In support of his assertion, appellee points out that the commutation of a sentence is the change of a punishment to which a person has been condemned to "a less severe" one. While this is the law, we do not see how it helps appellee's argument. *See Rawls v. United States*, 331 F.2d 21, 27 (8th Cir.1964); *Lime v. Blagg*,

345 Mo. 1, 131 S.W.2d 583, 585 (1939) (en banc). Under the commutation, Thomas'[s] fifteen-year sentence ended on June 16, 1981, four days after the Governor signed it. This was a substitution of "a less severe" sentence for the original fifteen-year sentence, which otherwise would not have ended until June 28, 1988.

Beyond this bare assertion of law, [sic] which in no way hurts Thomas' position, appellee presents no evidence supporting the theory that the commutation means anything other than what it says—i.e., that the fifteen-year sentence ended on June 16, 1981.[1]

The only possible theory under which Thomas could be held not to have fulfilled the sentence for attempted robbery is to argue that fulfillment of a commuted sentence is not equal to the fulfillment of a non-commuted sentence. There is, however, no authority for such a proposition. Instead, under Missouri law, "the commuted sentence has the same effect and the status of a prisoner is the same as though the sentence had originally been for the commuted term." *State v. Cerny*, 248 S.W.2d 844, 845 (Mo.1952); *Ex Parte Reno*, 66 Mo. 266, 269 (1877).

Because we hold that Thomas legally satisfied the sentence he received for the attempted robbery, this [C]ourt

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1. The court notes the statute under which Thomas'[s] 15-year sentence was commuted, Mo.Rev.Stat. § 216.355 (1969) (repealed 1979), would have made him eligible for commutation after completion of 9/12 of his sentence. Thomas'[s] sentence was commuted after completing 6/12 of his sentence. *But see Love v. Black*, 597 F.Supp. 1092, 1094 (E.D.Mo.1984). Although one may speculate as to the Governor's reasons for commuting Thomas, we do not believe this discrepancy is of any moment. Rather, because the commutation had been granted, our only concern must be with whether the remaining life sentence is jeopardy-barred.

must now address the question of whether the subsequent vacation of that sentence and his continued confinement under the felony-murder conviction violated the [D]ouble [J]eopardy [C]lause.

III.

The guarantee against double jeopardy consists of three separate constitutional protections. "It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S.Ct. 2072, 2076, 23 L.Ed.2d 656 (1969) (footnotes omitted).

This case involves the third prong, the prohibition against multiple punishments. *Ex Parte Lange*, 85 U.S. (18 Wall.) 163, 21 L.Ed.2d 872 (1873), was the first case to hold that the [D]ouble [J]eopardy [C]lause prohibits multiple punishments for the same offense, and it provides the starting point for our analysis.

In *Lange*, the criminal statute the defendant violated prescribed as punishment a fine of not more than two hundred dollars *or* imprisonment for not more than one year. Notwithstanding the wording of the statute, the trial judge sentenced the defendant to both the maximum fine and the maximum term of punishment. The defendant paid the fine and served five days of his sentence before his habeas corpus petition was heard. The sentencing judge then entered an order vacating the prior judgment and resentencing the defendant to one year in jail from the date of the resentencing. *Id.* at 164.

The Supreme Court held that once "the prisoner had fully performed, completed, and endured one of the alternative punishments which the law prescribed for that offence," the authority of the court "to punish for that offence was at an end * * *. The power was exhausted; its further exercise was prohibited. It was error * * *." *Id.* at 176.

The Court explained the necessity for the protection against multiple punishment as follows:

> For of what avail is the constitutional protection against more than one trial if there can be any number of sentences pronounced on the same verdict? Why is it that, having once been tried and found guilty, he can never be tried again for that offence? Manifestly[,] it is not the danger or jeopardy of being a second time found guilty. It is the punishment that would legally follow the second conviction which is the real danger guarded against by the Constitution. But if, after judgment has been rendered on the conviction, [sic] and the sentence of that judgment executed on the criminal, he can be again sentenced on that conviction to another and different punishment, or to endure [sic] the same punishment a second time, is the constitutional restriction of any value? Is not its intent and its spirit in such a case as much violated as if a new trial had been had, [sic] and[,] on a second conviction[,] a second punishment inflicted?
>
> The argument seems to us irresistible, and we do not doubt that the Constitution was designed as much to prevent the criminal from being twice punished for the same offence as from being twice tried for it.

Id. at 173.

The *Lange* decision was reaffirmed by the Court *In Re Bradley* 318 U.S. 50, 63 S.Ct. 470, 87 L.Ed. 608 (1943). In *Bradley* the Court faced a situation similar to *Lange* in which the trial court had imposed both a fine and a term of imprisonment under a statute which allowed only one of the two alternatives. *Bradley*, 318 U.S. at 52, 63 S.Ct. at 470-71. In *Bradley* the trial court attempted to return the fine that had been fully paid and amended the sentence to consist only of a term of imprisonment. The Supreme Court ruled that since there had been a full satisfaction of one of the alternative penalties of the law, the attempt to subsequently amend the sentence was a nullity[.] *Id.* "Since one valid alternative provision of the original sentence has been satisfied, the petitioner is entitled to be freed of further restraint." *Id.*

Thomas asserts that his position is analogous to the defendants' in *Lange* and *Bradley* because[,] under *State v. Morgan*, 612 S.W.2d 1 (Mo.1981) (en banc), his convictions for both felony-murder and the underlying felony were a violation of the [D]ouble [J]eopardy [C]lause. Thus, he asserts, two sentences were imposed on him by a court which only had the authority to impose one of the sentences under the applicable statutes.

Thomas'[s] interpretation of *State v. Morgan* is not at issue. Appellee acknowledges that the Missouri Court of Appeals was correct in holding the double conviction to be a violation of the [D]ouble [J]eopardy [C]lause under the principles set forth by the Missouri Supreme Court in *Morgan*. (Brief for Appellee, page 5). Thus, the only issue is whether the trial court had the authority to vacate the attempted robbery sentence after it had been satisfied as a cure to the double jeopardy violation.

Thomas'[s] position is analogous to that of the defendants' in *Lange* and *Bradley*. The Missouri court, in this case, had two alternative ways to punish Thomas for the attempted robbery. It could punish him by convicting him of the crime of attempted robbery and sentencing him for that crime, or it could punish him by piggy-backing the attempted robbery on to [sic] a charge of homicide and convicting him and sentencing him for the crime of felony-murder. The court, however, did not have the authority to punish him for attempted robbery under both alternatives of the Missouri law. *See Moryan*, 612 S.W.2d at 1-2.

Thomas received sentences under each of the alternatives, and he has now fully satisfied one of the sentences imposed on him for the attempted robbery conviction. Thus, under *Lange* and *Bradley*, he can no longer be punished under the alternative sentence. Recognizing this, the Missouri court has attempted to vacate the fully satisfied sentence so that it may continue to punish him for the attempted robbery under the felony-murder conviction. However, under *Lange*, the court has no authority to perform this maneuver, [sic] because[,] once one of the alternative punishments has been satisfied[,] the power of the court "to punish for that offence was at an end." *Lange*, 85 U.S. (18 Wall.) at 176.

The cases of *Holbrook v. United States*, 136 F.2d 649 (8th Cir.1943), and *United States v. Edick*, 603 F.2d 772 (9th Cir.1979), support this holding. In both cases[,] the defendant was sentenced to two terms of imprisonment, to be served consecutively, under statutes that authorized only one term of imprisonment. The distinguishing factor between the two cases is the fact that in *Edick*[,] the defendant had fully satisfied the first of the consecutive

sentences, while in *Holbrook*[,] neither of the sentences had been fully satisfied. *Edick*, 603 F.2d at 773; *Holbrook*, 136 F.2d at 650.

This Circuit[,] in *Holbrook*[,] held that up to the time there has been a legal satisfaction of one of the sentences, the court could simply vacate either of the sentences to remedy the double jeopardy violation, applying any time served under the vacated sentence to the remaining sentence. 136 F.2d at 650. "Since in either situation [the defendants] would be receiving proper credit for the time served, [the defendants] can have no cause to complain, no matter which sentence may be set aside, so long as there has been no legal satisfaction of either under the terms and conditions of the judgment." *Id.* The court went on to hold that the cause was "not parallel with *Ex Parte Lange*" because "there was no legal satisfaction of" either of the sentences. *Id.* The plain implication of this decision is that, [sic] if one of the sentences had been fully satisfied, the remedy of vacating it to solve the double jeopardy violation would be violative of the prohibition against multiple punishments enunciated in *Lange* and *Bradley*.

In *Edick*, the case in which the first of the sentences had been fulfilled, the Ninth Circuit held that the double jeopardy violation could not be cured by vacating an already satisfied sentence. 603 F.2d at 778. The court, basing much of its analysis on *Lange*, *Bradley*, and *Holbrook*, instead ordered the lower court to vacate the remaining unfulfilled sentence. *Id.* at 777-78.

It is true that in recent years the Supreme Court, as well as this [C]ourt, has been hesitant to expand the protection against muliple punishments in the area of sentencings. In *United States v. DiFrancesco*, the Court ruled that

"[t]he Constitution does not require that sentencing should be a game in which a wrong move by the judge means immunity for the prisoner." 449 U.S. 117, 135, 101 S.Ct. 426, 436, 66 L.Ed.2d 328 (1980) (quoting *Bozza v. United States*, 330 U.S. 160, 166-67, 67 S.Ct. 645, 649, 91 L.Ed. 818 (1947)). And in *Missouri v. Hunter*, the Court held that the multiple[-]punishment prohibition was not violated by subjecting a defendant to two punishments for the same conduct where such punishment was authorized by the legislature. 459 U.S. 359, 368-69, 103 S.Ct. 673, 679, 74 L.Ed.2d 535 (1983). The Court stated that:

> [T]he question of what punishments are constitutionally permissible is no different from the question of what punishments the Legislative Branch intended to be imposed. Where Congress intended, as it did here, to impose multiple punishments, imposition of such sentences does not violate the Constitution.

Id. at 368, 103 S.Ct. at 679 (quoting *Albernaz v. United States*, 450 U.S. 333, 344, 101 S.Ct. 1137, 1145, 67 L.Ed.2d 275 (1981)). Furthermore,

> [a]s *Ex Parte Lange* demonstrates, a defendant may not receive a greater punishment than the legislature had authorized. No double jeopardy problem would have been presented in *Ex Parte Lange* if Congress had provided that the offense there was punishable by both fine and imprisonment even though that is multiple punishment.

DiFrancesco, 449 U.S. at 139, 101 S.Ct. at 438.

The question of whether the Missouri Legislature intended, in situations such as this, to allow separate and cumulative punishments for the underlying felony and for

the first[-]degree felony-murder has been definitively answered by the Missouri Supreme Court. The answer is no. *State v. Morgan*, 612 S.W.2d 1, 2 (Mo.1981) (en banc); *see also State v. Olds*, 603 S.W.2d 501, 510 (Mo.1980) (en banc). Thus, the imposition of the multiple punishments was "a greater punishment than the legislature intended" and a violation of the [D]ouble [J]eopardy [C]lause just as great as that suffered by the defendants in *Lange* and *Bradley*.

Regardless of this, the district court held that because the attempted robbery charge was vacated and the time served under it was credited to the felony-murder sentence, the appellant suffered no violation of his constitutional rights because he was "not being subjected to greater punishment than the legislature intended."[2] This statement ignores *Bradley*.

In *Bradley*, the court realized its mistake in sentencing and, on the same day the fine was paid, the court remitted it to the defendant in order to be able to subject him to the term of imprisonment. 318 U.S. at 50-51, 63 S.Ct. at 470. But, as previously pointed out, the Supreme Court held that the payment of the fine had satisfied that portion of the judgment. *Id.* at 51, 63 S.Ct. at 470. And, "as the judgment of the court was thus executed

2. In support of its assertion the district court points to a footnote in the decision of this court in *Thompson v. Missouri*, 724 F.2d 1314, 1319 n. 10 (8th Cir.1984). The footnote states that "conviction and punishment for both the underlying felony and felony-murder would not violate the prohibition against multiple punishments." *Id.* As support for this assertion, the footnote quotes the holding from *Missouri v. Hunter* that "the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended." *Id.* However, as we have already noted, sentencing a defendant for both felony-murder and the underlying felony is "prescribing greater punishment than the Missouri Legislature intended" under the cases of *Morgan* and *Olds*.

so as to be a full satisfaction of one of the alternative penalties of the law, the power of the court was at an end." *Id.* at 52, 63 S.Ct. at 471. The same is true here. Just as the trial court in *Bradley* could not cure the double jeopardy violation by vacating the satisfied judgment and giving the defendant back his money, the trial court here cannot cure a similar violation by vacating the satisfied sentence and giving appellant back this time.

Thus, we reverse the district court's decision and hold that the vacating of the attempted robbery sentence and crediting of time served to the felony-murder sentence was an inadequate remedy for the double jeopardy violation.

We cannot agree with the dissent's characterization of our holding with regard to double jeopardy as relying on a hypertechnical interpretation of the law when no real harm would befall Thomas by serving the life sentence for felony-murder. While no doubt application of the [D]ouble [J]eopardy [C]lause in this case must be accomplished by observing the order in which the sentences were imposed, we do not have the discretion to apply it in any other manner. On the contrary, the court must construe violations of the [D]ouble [J]eopardy [C]lause with no less scrutiny than it would other constitutional violations. *Morris v. Mathews*, 475 U.S. 237, 106 S.Ct. 1032, 1040-43, 89 L.Ed.2d 187 (1986) (Blackmun, J., concurring).

IV.

Today's decision does not in any way overrule the holding of this court in *Hardy v. United States*, 292 F.2d 192 (8th Cir.1961). That case dealt with the imposition of two concurrent sentences and is thereby distinguish-

able from the situation in this case where the sentences were consecutive, with one of the sentences fully satisfied. Additionally, this [C]ourt intends to follow the approach it has taken in the past of curing remedies to multiple[-]punishment violations in a way "which most clearly approximates the intention of the district judge at the time of the original sentencing." *Gerberding v. United States*, 471 F.2d 55, 56 (8th Cir.1973). However, the cure must be constitutional.

To this end, we believe the Circuit Court of the City of St. Louis may have an adequate cure to the multiple[-]punishment problem other than setting Thomas free. *See Morris v. Mathews*, 475 U.S. 237, 106 S.Ct. 1032, 89 L.Ed. 2d 187 (1986). The Supreme Court[,] in *Mathews*[,] held that reducing a defendant's concededly jeopardy-barred conviction for aggravated murder to a conviction for murder that was not jeopardy-barred was an adequate remedy for the double jeopardy violation. *Id.* 106 S.Ct. at 1037-39.

The double jeopardy problem in *Mathews* arose as the result of the defendant['s] having first been convicted of the charge of aggravated robbery. Subsequently, he was also convicted of the charge of felony-murder when the state discovered he had committed a homicide along with the robbery. *Id.* at 1033-34. In its analysis[,] the Court first noted that the combination of the two convictions was a violation of the [D]ouble [J]eopardy [C]lause. *Id.* at 1037. The Court went on to rule that because the jury had found the defendant guilty of aggravated murder, they had also found him guilty, "a fortiori, of the lesser (included) offense of murder as well." Because this lesser charge would not be jeopardy-barred, [sic] since it covered conduct not within the charge of aggravated

robbery, the Court ruled that modifying the felony-murder conviction to the lesser included offense of murder would cure the jeopardy violation so long as the defendant could not "demonstrate a reasonable probability that he would not have been convicted of the non-jeopardy-barred offense absent the presence of the jeopardy-barred offense." *Id.* at 1038.

On its face, we see nothing in the *Mathews* opinion which would indicate that a similar remedy would not be adequate in Thomas'[s] case. We believe the state court judge can correct the double jeopardy problem by changing the jeopardy-barred felony-murder conviction to a non-jeopardy-barred lesser included offense. The burden would then shift to Thomas to show that without the improper inclusion of the jeopardy-barred charge, there is a reasonable probability he would not have been convicted.

Therefore, we remand the case to the district court for proceedings in accord with the dictates of our opinion. Furthermore, we hold that if[,] within ninety days[,] Thomas is not resentenced or a retrial initiated, the writ of habeas corpus should issue.[3]

McMILLIAN, Circuit Judge, concurring in part and dissenting in part.

I concur in Parts I, II, and III of Judge Hanson's opinion. I, however, must dissent from Part IV. I agree that the decisions of the Supreme Court and prior decisions of this [C]ourt compel us to hold that Thomas'[s] constitu-

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3. In the event that Thomas could make a proper showing that he would not have been convicted, nothing would prevent the State from retrying him under the non-jeopardy-barred charge. *See Mathews*, 106 S.Ct. at 1038 (stating that a retrial is appropriate upon the defendant's showing of prejudice).

tional rights were violated by the vacation of the sentence for attempted robbery, which had been completely served, and his continued confinement under the life sentence for felony murder. *E.g., Ex parte Lange,* 85 U.S. (18 Wall) 163, 21 L.Ed. 872 (1873); *United States v. Edick,* 603 F.2d 772 (9th Cir.1979). I do not agree, however, that this violation can be cured by sentencing or retrying Thomas on the lesser included offense of murder. I would reverse the judgment of the district court and remand with instructions to issue the writ.

The [D]ouble [J]eopardy [C]lause provides that no person shall twice be put in jeopardy for the same offense. I believe the clause prohibits not only multiple trials for the same offense and multiple punishments for the same offense, but also multiple trials for different offenses arising from the same transaction. *Mathews v. Morris,* 106 S.Ct. 1032, 1044 (Brennan, J., dissenting). "'All the charges against a defendant that grow out of a single criminal act, occurrence, episode, or transaction' shall be prosecuted in one proceeding." *Id.* (citation omitted). The state should not be permitted to try or sentence a defendant on a lesser included offense, [sic] after a conviction for the greater offense is vacated because it is jeopardy barred.

However, even if a second prosecution is permissible under the circumstances of this case, I believe, contrary to the majority in *Mathews v. Morris,* that the correct test for determining whether a new trial is necessary is the test applied by the Sixth Circuit in *Mathews v. Marshall,* 754 F.2d 158, 162 (6th Cir.1985), *rev'd Mathews v. Morris,* 475 U.S. 237, 106 S.Ct. 1032, 89 L.Ed.2d 187 (1986). The Sixth Circuit held that a defendant should be granted a new trial if he or she can demonstrate a reasonable possibility that he or she was prejudiced in the trial of the

lesser included offense by the evidence of the greater offense, which was jeopardy barred. As Justice Blackmun points out in his concurring opinion in *Mathews v. Morris,* the reasonable probability[-]of[-] prejudice standard is inconsistent with the harmless error test adopted in *Chapman v. California,* 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)[,] and *Fahy v. Connecticut,* 375 U.S. 85, 84 S.Ct. 229, 11 L.Ed.2d 171 (1963)[,] and applied repeatedly to constitutional errors, [sic] which are not *per se* reversible errors. *Mathews v. Morris,* 106 U.S. at 1043. "Once it has been established that the state has violated the Constitution in the course of a prosecution, the proceedings lose whatever presumption of regularity they formerly enjoyed, and the state bears a heavy burden in arguing that the result should nonetheless be treated as valid." *Id.*

BOWMAN, Circuit Judge, dissenting.

If Thomas's felony[-]murder conviction is to be set aside, I agree with Judge Hanson's view that the state should have an opportunity to have Thomas resentenced on a lesser-included, non-jeopardy-barred offense in accordance with *Morris v. Mathews,* 475 U.S. 237, 106 S.Ct. 1032, 89 L.Ed.2d 187 (1986). I dissent, however, from the holding of the Court that the [D]ouble [J]eopardy [C]lause has been violated in this case.

Absent resentencing, the result of the Court's holding today is that Thomas, who was convicted of attempted robbery and felony murder and originally sentenced to consecutive prison terms of fifteen years and life, will be released immediately, having served only seven years of his fifteen-year sentence on the attempted robbery conviction. Unless Thomas is resentenced, he will go free on the basis of a series of fortuitous events. Because the

governor commutated Thomas's attempted robbery sentence before the state trial court was able to vacate it in accordance with the holding (several years after Thomas's conviction) of the Missouri Supreme Court in *State v. Morgan*, 612 S.W.2d 1 (Mo.1981) (en banc) (prohibiting imposition of sentences on both felony murder and the underlying felony), the Court finds that Thomas cannot be required to serve the life sentence on his felony murder conviction.[1] I respectfully disagree.

In vacating the felony murder sentence because Thomas has served the commutated sentence for attempted robbery, the Court relies upon dicta in *Holbrook v. United States*, 136 F.2d 649, 652 (8th Cir.1943), which suggests that if one of two consecutive sentences has been served, [sic] and the court must vacate one of those sentences, then *Ex parte Lange*, 85 U.S. (18 Wall.) 163, 21 L.Ed. 872 (1873), controls and requires the uncompleted sentence to be vacated and the prisoner to be released. I disagree with

1. Under today's decision, Thomas effectively slips through a judicially manufactured crack in the criminal justice system, even though his early release contravenes not only the intent of the sentencing court, but also the intent of the Missouri legislature as expressed in the current statutory punishment for felony murder. In 1984, the Missouri legislature revised the statutory treatment of felony murder, with the result that *State v. Morgan*, and *State v. Olds*, 603 S.W.2d 501 (Mo.1980) (en banc), which looked to legislative intent to determine that the [D]ouble [J]eopardy [C]lause was offended by the imposition of sentences for both felony murder and the underlying felony, are no longer a [sic] valid statement[s] of that intent. Murder in the second degree, of which felony murder is one example, is now classified as "a class A felony, and the punishment for second degree murder shall be in addition to the punishment for commission of a related felony or attempted felony, other than murder or manslaughter." Mo.Rev.Stat. § 565.021(2) (Supp.1984). Thus, if Thomas were convicted today, [sic] and the same sentences were imposed, then under *Whalen v. United States*, 445 U.S. 684, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980), the Court would have to find that the [D]ouble [J]eopardy [C]lause had not been violated. Thomas's sentences for both attempted robbery and felony murder would stand.

the dicta in *Holbrook* and find the Court's reliance on *Lange* and *In re Bradley*, 318 U.S. 50, 63 S.Ct. 470, 87 L.Ed. 608 (1943)[,] to be misplaced.[2]

In both *Lange* and *Bradley*, the sentencing court simultaneously imposed both a fine and imprisonment for a single offense, although at the time of sentencing only one of those two alternative punishments could properly be imposed under the applicable statute. By the time the sentencing judge discovered his mistake, the defendant already had paid the fine. Because the nature of the alternative punishments was different, and because the fine and imprisonment were unauthorized cumulative punishments for a single statutory offense, the Supreme Court held in each case that the [D]ouble [J]eopardy [C]lause was implicated. As the Court noted in *Lange*, reimposition of the year-long prison sentence following payment of the fine and five days in jail would result in more punishment than was authorized by statute. It stated:

> The court, through inadvertance, imposed both punishments, when it could rightfully impose but one. After the fine was paid and passed into the treasury, and the petitioner had suffered five days of his one year's imprisonment, the court changed its judgment by sentencing him to one year's imprisonment from that time. If this latter sentence is enforced[,] it follows that the prisoner in the end pays his two hundred

2. Indeed, the concurring opinion in *Holbrook* notes that to that time, no circuit court of appeals had found *Lange* to be applicable beyond its narrow facts, i.e., in the situation of "statutory alternative sentences" for the same offense. *Holbrook*, 136 F.2d at 653 (Stone, J., concurring). This is not such a case. Rather, it is a case in which Thomas was sentenced for two separate offenses, with the Missouri Supreme Court deciding long after the fact that he could be sentenced for one or the other[,] but not both.

> dollars [sic] fine and is imprisoned one year and five days, being all that the first judgment imposed on him and five days' imprisonment in addition. And this is done because the first judgment was confessedly in excess of the authority of the court.

85 U.S. at 175.

The circumstances surrounding Thomas's conviction and sentencing are far different from those in *Lange* and *Bradley*. The illegality in the state of Missouri of imposing two sentences when a defendant has been convicted of both felony murder and an underlying felony was not established until 1981. Thomas was sentenced in 1973. At that time, the sentencing court could not possibly have known that its imposition of a sentence for each conviction would later be found unlawful. Moreover, the two sentences were not alternative statutory punishments for one offense. Rather, they were two separate statutory punishments for two separate offenses. Finally, the two punishments were of the same nature—imprisonment—and thus were interchangeable, whereas the punishments in *Lange* and *Bradley* were not.[3]

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3. *United States v. Edick*, 603 F.2d 772 (9th Cir.1979), cited by the Court in support of its holding, also involves an instance where the punishments imposed on the two counts were not interchangeable. Edick was sentenced to imprisonment for three years on Count I and to a consecutive five[-]year term of probation on Count II. The Ninth Circuit stated:

> Here, the trial court's error was to subject Edick to two punishments when . . . only one was authorized. Either prison time or probation was valid under the statutory alternatives, but, to avoid an illegal cumulation of punishment, the sentences had to be imposed concurrently. Manifestly, prison time and probation cannot be served concurrently.

Id. at 777. Moreover, the Ninth Circuit was concerned with resentencing, *id.* at 778, whereas in this instance[,] only vacation of one sentence is required.

The [D]ouble [J]eopardy [C]lause "protects against multiple punishments for the same offense." *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S.Ct. 2072, 2076, 23 L.Ed.2d 656 (1969). In *Pearce*, the Supreme Court interpreted this language to mandate that, when resentencing is required following a new trial, time already served under the old sentence be credited toward the new sentence. The state trial court's order in the present case, vacating the attempted robbery sentence and crediting the time already served thereunder toward the life sentence for felony murder, is responsive to Thomas's claim that he cannot be twice punished for the same offense. In accordance with *State v. Morgan*, Thomas is serving only the sentence imposed on one of his two original convictions. Thomas's felony murder sentence is not increased by this order, and the result is in accord with the holding in *Pearce*. Thomas correctly asserts that the [D]ouble [J]eopardy [C]lause prohibits the state from requiring him to serve both sentences. However, the [D]ouble [J]eopardy [C]lause does not require that Thomas be given the choice of which of two simultaneously[-]imposed prison sentences he is to serve when it transpires that he cannot be made to serve both.[4]

The Court's double jeopardy holding in the present case, when viewed together with earlier Eighth Circuit precedent, produces strangely anomalous results. First, in today's holding the Court ignores Eighth Circuit prec-

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4. The Fifth Circuit has held accordingly, remanding the case for vacation of the shorter of two consecutive sentences after it had been fully served. *Rollins v. United States*, 543 F.2d 574 (5th Cir.1976); *cf. United States v. Hodges*, 628 F.2d 350, 353 (5th Cir.1980) ("This Court has consistently held that resentencing to the maximum penalty authorized by law is permitted when the aggregate of the illegally imposed consecutive sentences equals or exceeds the maximum for which the court lawfully could have sentenced the defendant.").

edent establishing that the intention of the sentencing judge is the determinative factor in deciding which of two sentences to vacate when both sentences cannot stand together. *Jones v. United States*, 396 F.2d 66, 69 (8th Cir.1968), *cert. denied*, 393 U.S. 1057, 89 S.Ct. 695, 21 L.Ed. 2d 697 (1969); *Sawyer v. United States*, 312 F.2d 24, 27-29 (8th Cir.), *cert. denied*, 374 U.S. 837, 83 S.Ct. 1888, 10 L.Ed. 2d 1058 (1963); *see also United States v. Pietras*, 501 F.2d 182, 188 (8th Cir.), *cert. denied*, 419 U.S. 1071, 95 S.Ct. 660, 42 L.Ed.2d 668 (1974). Today's holding dictates that decisive weight be placed upon the order in which the sentences were imposed; i.e., that the sentencing judge first sentenced Thomas on Count I to a 15-year term for attempted robbery, and thereafter[,] on Count II to a consecutive life sentence for felony murder. Under the Court's analysis, Thomas's claim of double jeopardy would be baseless if the sentencing judge had simply reversed the order in which the prison sentences were to be served. *See Holbrook*, 136 F.2d at 652. Surely the question of whether a convicted murderer is to serve the life term that the sentencing authority plainly intended he was to serve should not be decided on a basis so essentially whimsical. As the Supreme Court remarked in *Bozza v. United States*, 330 U.S. 160, 166-67, 67 S.Ct. 645, 649, 91 L.Ed. 818 (1947), "The Constitution does not require that sentencing should be a game in which a wrong move by the judge means immunity for the prisoner." The Court also rejected the sporting game approach to double jeopardy in *Green v. United States*, 365 U.S. 301, 81 S.Ct. 653, 5 L.Ed. 2d 670 (1961). In *Green*, the defendant argued that when the trial court imposed two sentences for the same offense[,] the court lost its power to sentence further once it had issued the first sentence, and therefore that only the first, shorter sentence was valid. The Court responded

that it was the intention of the trial judge[,] and not the order of sentencing[,] that was to govern:

> Although petitioner is technically correct that sentences should not have been imposed on both counts, the remedy which he seeks does not follow. This is not a case where sentence was passed on two counts stating alternative means of committing one offense; rather, the third count involved additional characteristics which made the offense an aggravated one—namely, putting persons in jeopardy of life by use of a dangerous weapon. Plainly enough, the intention of the district judge was to impose the maximum sentence of twenty-five years for aggravated bank robbery, and the formal defect in his procedure should not vitiate his considered judgment.

365 U.S. at 306, 81 S.Ct. at 656.

I believe that similar logic applies in the present case. The original error in sentencing Thomas was made in good[-]faith reliance on existing law, and the chain of circumstances following the sentencing should not be available to Thomas as a mechanism by which he can force his early release. In vacating the attempted robbery sentence, the state trial court vindicated what clearly would have been the intent of the sentencing court had the illegality of the double sentencing been apparent at the time of sentencing. The law of Missouri authorizes a life sentence for felony murder[,] and it is clear that the sentencing court intended that Thomas should serve a life sentence. In these circumstances, it is little short of preposterous that the sequence in which the consecutive sentences were pronounced should provide a basis for the early release of a felon properly convicted of murder.

The extreme hypertechnicality of today's decision is illustrated further by the point that had Thomas been sentenced to concurrent, rather than consecutive, sentences of fifteen years and life imprisonment, commutation of the fifteen-year sentence would not provide a basis for his early release on double jeopardy grounds. In keeping with *United States v. Leather*, 271 F.2d 80 (7th Cir.1959), *cert. denied*, 363 U.S. 831, 80 S.Ct. 36, 5 L.Ed.2d 81 (1960), this Circuit held in *Hardy v. United States*, 292 F.2d 192 (8th Cir.1961), that completion of the shorter of two concurrent sentences does not excuse the prisoner from serving the longer of those sentences when one of them must be invalidated[, the] Court stated:

> [T]he right of the court in such a situation to simply vacate the shorter sentence and allow the longer one to stand has been recognized. Appellant argues, however, that here his 10-year sentence had been served, so that there was no right to vacate it, and that consequently[,] only the 20-year sentence was capable of being set aside. A similar situation and contention were involved in *United States v. Leather* [271 F.2d 80 (7th Cir. 1959)] . . . where the court held that the longer sentence standing on the record would legally constitute the measure or the term of the punishment in the situation, [sic] unless the trial court saw fit to vacate it, and that the shorter concurrent sentence thus would, while the two sentences stood together, have incidence only in relation to this controlling measure or term of his punishment. The court[,] accordingly[,] upheld the right of the trial court in that case, as here, to vacate the shorter sentence, [sic] even though the defendant had by that time been confined for a period equal to its length. . . . We are in agreement with the *Leather* case.

Id. at 194-95. In today's decision, the Court fails to offer any coherent reason for its conclusion that the consecutive[,] rather than concurrent nature of Thomas's prison sentences breathes life into a double jeopardy claim that otherwise would have been dead on arrival.

In addition, the Court's decision brings about yet another anomalous result. When one of two prison sentences must be vacated, today's decision has the unfortunate result of affording a sentencing judge less authority to determine which sentence to vacate when the sentences are consecutive than when the sentences are concurrent. This result defies logical explanation, for the more serious crimes deserve more severe punishment, and as a general proposition[,] the more reprehensible the crimes the more likely it is that the original sentencing order will have imposed consecutive sentences. The Court offers no constitutional theory to justify the anomaly it thus creates.

I believe that release of Thomas on double jeopardy grounds is not required by either Supreme Court precedent or the law of this Circuit, much less by the language of the [D]ouble [J]eopardy [C]lause itself. Release of a prisoner properly convicted of both attempted robbery and felony murder after service of only the sentence on the attempted robbery conviction removes logic and judicial control from the sentencing process. Plainly, if the decision in *State v. Morgan* had been handed down before Thomas's sentencing, the sentencing court would have sentenced him on the more serious of the two convictions and would have imposed only the life sentence for the felony murder. This is not, as in *Lange*, a situation in which the judge, having clear precedent or statutory guidance before him, mistook his authority to impose cumulative sentences. Instead, this is a case in which the law changed long after the sentenc-

ing occurred. Thomas seeks to take advantage of that change and to gain his early release on the basis of an argument that mocks and trivializes the [D]ouble [J]eopardy [C]lause's important purpose of preventing multiple punishments for a single crime. Under the sentencing order to which Thomas presently is subject, he would suffer only one punishment: the life sentence for felony murder. He would serve in total not one day more than the period of confinement that such a sentence entails. I cannot agree that requiring him to serve this properly imposed sentence offends the [D]ouble [J]eopardy [C]lause. Accordingly, I would affirm the order of the District Court.

(Filed June 28, 1985)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 84-1760 C (5)

LARRY P. THOMAS,
Petitioner,

vs.

TERRY MORRIS, Superintendent of the Missouri Training Center for Men,
Respondent.

ORDER

This case is before the Court following the report and recommendation of the Honorable Robert D. Kingsland, United States Magistrate. Petitioner brings this action for a writ of habeas corpus, asserting that the writ should issue since he claims he was subjected to double jeopardy in violation of the Fifth and Fourteenth Amendments to the United States Constitution. Neither party has filed objections to the report and recommendation.

Petitioner was convicted of first degree felony murder and attempted robbery in the first degree by means of a dangerous and deadly weapon after a jury trial in St. Louis City Circuit Court. On May 25, 1973, petitioner was sentenced to serve a fifteen-year sentence for the attempted

robbery conviction and a term of life imprisonment for the first degree felony murder conviction, the sentences to be served consecutively. The Missouri Court of Appeals affirmed petitioner's conviction on February 11, 1975. *State v. Thomas*, 522 S.W.2d 74 (Mo.App. 1975).

After his conviction was affirmed on appeal, petitioner collaterally attacked the judgment by filing a Missouri Supreme Court Rule 27.26 motion. After considering the appeal of the second denial of his Rule 27.26 motion, the Missouri Court of Appeals directed the Circuit Court to hold a new hearing on petitioner's motion.

At the time of the hearing in the Circuit Court, petitioner's attorney amended the Rule 27.26 motion[,] adding a double jeopardy claim. On June 16, 1981, the fifteen[-] year sentence for the attempted robbery conviction was commutated. This fact was adduced from the letter the Missouri Department of Corrections sent Magistrate Kingsland. On June 24, 1982, the St. Louis City Circuit Court vacated petitioner's sentence and conviction for attempted robbery, finding that the conviction along with the conviction and consecutive sentence in the felony murder charge violated the Double Jeopardy Clause. In its opinion filed September 27, 1983, the Missouri Court of Appeals affirmed the Circuit Court's decision. *Thomas v. State*, 665 S.W.2d 621 (Mo.App. 1983). The time petitioner served prior to the trial court's ruling was credited toward the life sentence to be served on the murder conviction.

This case involves the third protection of double jeopardy, the protection against cumulative punishments. The protection against cumulative punishments is designed to ensure that the sentencing discretion of courts is confined to the limits of the legislature. *Ohio v. Johnson*, ... U.S.

....., ..., 104 S.Ct. 2536, 2541, 81 L.Ed.2d 425 (1984); *Missouri v. Hunter*, 459 U.S. 359, 366, 103 S.Ct. 673, 678, 74 L.Ed.2d 535 (1983); *Thompson v. Missouri*, 724 F.2d 1314, 1319 (8th Cir. 1984). The question under the Double Jeopardy Clause whether punishments are "multiple" is one of legislative intent since the substantive power to prescribe crimes and determine punishments is vested in the legislature. *United States v. Wiltberger*, 5 Wheat 76, 5 L.Ed. 37 (1820).

The Circuit Court's action vacating petitioner's conviction for attempted robbery was taken according to the principles set forth in *State v. Morgan*, 612 S.W.2d 1 (Mo. banc 1981). In *Morgan*, the Court held that in light of the case *Whalen v. United States*, 445 U.S. 684, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980), the Missouri General Assembly did not intend to allow separate and cumulative punishments for felony-murder and the underlying felony which produced the homicide. *Morgan, supra*, at 1.

What petitioner asserts[,] and the Magistrate subsequently adopted[,] is that the sentencings are what subjected petitioner to double jeopardy. Petitioner argues that he had completed the sentence for attempted robbery before the trial court vacated the sentence; therefore, the trial court would not have jurisdiction to resentence him for the felony murder conviction. As a result, petitioner argues, a resentencing for felony murder would violate the Double Jeopardy Clause.

The Court cannot agree with petitioner's argument or the Magistrate's report and recommendation. The Supreme Court has held that "with respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court

from prescribing greater punishment than the legislature intended". *Missouri v. Hunter, supra,* 459 U.S. at 366, 103 S.Ct. at 678; *see also Thompson v. Missouri, supra,* 724 F.2d at 1319, fn. 10. Once the petitioner's sentence was vacated, the entire time he served for the attempted robbery sentence was duly credited to his life sentence on the felony murder conviction. Therefore, petitioner suffered no violation of his Constitutional rights as he is not being subjected to greater punishment than the legislature intended. Accordingly,

IT IS HEREBY ORDERED that the report and recommendation of the Honorable Robert D. Kingsland, United States Magistrate[,] be and is rejected.

IT IS FURTHER ORDERED that Larry P. Thomas'[s] petition for the issuance of a writ of habeas corpus be and is DENIED.

Dated this 28th day of June, 1985.

/s/ Stephen N. Limbaugh
United States District Judge

(Filed March 29, 1985)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 84-1760C(5)

LARRY P. THOMAS,
Plaintiff,

v.

TERRY MORRIS, Superintendent, Missouri Training Center for Men,
Defendant.

MAGISTRATE'S REVIEW AND RECOMMENDATION

The petition of Larry P. Thomas for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 was referred to the undersigned United States Magistrate for review and a recommended disposition. 28 U.S.C. § 636(b).

The petitioner, Larry P. Thomas, was convicted of first degree felony murder and attempted robbery in the first degree by means of a dangerous and deadly weapon after a trial by jury in the St. Louis City Circuit Court. On May 25, 1973, the petitioner was sentenced to serve a fifteen-year sentence on the attempted robbery conviction and a term of life imprisonment on the first degree felony murder conviction, said sentences to be served consecu-

tively. The Missouri Court of Appeals affirmed the conviction on February 11, 1975. *State v. Thomas*, 522 S.W.2d 74 (Mo. App. 1975). Petitioner subsequently filed a Missouri Supreme Court Rule 27.26 motion in state court collaterally challenging his conviction in 1973. That motion was thereafter denied by the state court, and on appeal from the denial, the Missouri Court of Appeals, Eastern District, on June 3, 1980, entered a mandate requiring the Circuit Court to hold an evidentiary hearing. The Circuit Court held the required hearings and reported its findings to the Court of Appeals on December 19, 1980. On January 15, 1981, the Missouri Court of Appeals vacated the trial court's dismissal of petitioner's 27.26 motion and remanded the cause for a new hearing after a determination that the transcript on appeal did not include all the evidence adduced at the hearing on said motion. An evidentiary hearing was held on March 27, 1981[,] in the Circuit Court of the City of St. Louis.

On that date, petitioner's attorney amended the Rule 27.26 motion by adding a double jeopardy claim. On June 16, 1981, the fifteen-year sentence for attempted robbery was commutated. (This is documented and included in the record and marked as court's Exhibit A). In an opinion dated June 24, 1982, the Circuit Court of the City of St. Louis partially denied petitioner's motion[,] but vacated the conviction and sentence for attempted robbery, finding that said conviction, along with the conviction and consecutive sentence for first degree felony murder, was in violation of double jeopardy. Petitioner then appealed the partial denial of his Rule 27.26 motion to the Missouri Court of Appeals, Eastern District. On September 27, 1983, the Missouri Court of Appeals affirmed the trial court's ruling. Petitioner is currently incarcerated

in the Missouri Training Center for Men in Moberly, Missouri[,] serving the first degree felony murder sentence.

On August 1, 1984, petitioner filed the present petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner asserts that his present confinement and life sentence for the offense of first degree felony murder is unconstitutional and in violation of the [D]ouble [J]eopardy [C]lause of the [F]ifth [A]mendment to the United States Constitution[,] made applicable to the states through the [F]ourteenth [A]mendment.

This court is initially presented with the question of whether petitioner has exhausted his state court remedies. It is statutorily mandated that an inmate in state custody fully exhaust all available remedies prior to proceeding in a federal habeas corpus action. The respondent concedes, and the record reflects that petitioner, in this case, has fully exhausted his state court remedies.

This court turns now to a consideration of the substantive constitutional claim raised by petitioner. The respondent correctly states in its response to the petitioner's writ of habeas corpus that the propriety of a sentence rendered by a state court is usually not cognizable in a writ of habeas corpus. But when a sentencing court commits a constitutional error in imposing a criminal sentence rendering it or the underlying conviction fundamentally unfair, then that sentence may be properly challenged in a federal habeas corpus proceeding. *Neimann v. Parrat*, 596 F.2d 316, 317 (8th Cir. 1979). It is the opinion of this court that petitioner's habeas corpus petition is correctly before this court, and for the reasons herein stated, petitioner's habeas corpus writ should be granted.

The United States Supreme Court in *Whalen v. United States*, 445 U.S. 684 (1980), indicated that the dispositive question in determining whether a particular sentence imposed by a court violates the double jeopardy guarantee of the Constitution is whether the legislature so intended for a cumulative punishment to be imposed for the crime committed. The petitioner in *Whalen* was convicted of rape and killing the victim in the perpetration of the rape and was sentenced to consecutive terms of imprisonment of twenty years to life for first degree murder and of fifteen years to life for rape. The Supreme Court found that the District of Columbia Legislature (Congress), by separate statutory provision, had mandated that a defendant may not be subjected to multiple punishments for two crimes found to be the same offenses under the rule of statutory construction articulated in *Blockburger v. United States*, 284 U.S. 299 (1932). The Supreme Court held that once the legislature proscribes double punishment, the court is thereafter barred from doing otherwise.

In *State v. Morgan*, 592 S.W.2d 796 (Mo. banc), *vacated*, 449 U.S. 809 (1980), *orig. op. aff'd*, 612 S.W.2d 1 (Mo. banc 1981), the Missouri Supreme Court stated, "It is therefore clear that under *Blockburger v. United States*, 284 U.S. 299 (1932), as applied in *Harris v. Oklahoma*, 433 U.S. 682 (1977), the felony relied on to prove intent in a felony-murder case is a lesser-included offense of the murder." *State v. Morgan, supra*, 592 S.W.2d at 803. "Therefore, the Court held that convicting a defendant of both felony murder and the underlying felony subjects him to double jeopardy." *Williams v. State*, 646 S.W.2d 848, 850 (Mo. App. 1982), referring to *State v. Morgan, supra*.

In *State v. Olds*, 603 S.W.2d 501 (Mo. banc 1980), using the approach required by *Whalen v. United States, supra*, 445 U.S. 684, the Missouri Supreme Court held that the state legislature had not intended "to allow a court to separately punish a defendant both for felony-murder and the underlying felony" and vacated the defendant's felony conviction. *State v. Olds, supra*, 603 S.W.2d at 510. The Missouri Supreme Court reached the same conclusion in *State v. Morgan*, 612 S.W.2d 1 (Mo. banc 1981), after the United States Supreme Court remanded that case for reconsideration in light of *Whalen v. United States, supra*, 445 U.S. 684.

Following the dictates of *State v. Morgan*, the circuit court vacated the fifteen-year conviction and sentence for attempted robbery first degree on June 24, 1982, and credited the time served on the attempted robbery sentence towards the life sentence for first degree felony murder. Petitioner's sentence for attempted robbery first degree had been commutated though on June 16, 1981, a year before the sentence and conviction were vacated by the circuit court. By vacating the attempted robbery conviction and sentence, the circuit court acknowledged that petitioner's original sentence was in error. Consecutively sentencing petitioner to a fifteen-year sentence for attempted robbery and a life sentence for the first degree felony murder was a violation of the [D]ouble [J]eopardy [C]lause. The question remains, however, whether the state court had the power to vacate the attempted robbery sentence that had already been served without further violating the [D]ouble [J]eopardy [C]lause.

The [D]ouble [J]eopardy [C]lause of the [F]ifth [A]mendment, applicable to the states through the [F]ourteenth [A]mendment, provides that no person shall "be subject for the same offense to be twice put in jeopardy

of life or limb." The [D]ouble [J]eopardy [C]lause "protects against a second prosecution for the same offense after acquittal. It protects against the second prosecution for the same offense after conviction, and it protects against multiple punishments for the same offense." *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969). When consecutive sentences are imposed at a single criminal trial, the role of the constitutional guarantee is limited to assuring that the court does not exceed its legislative authorization by imposing multiple punishments for the same offense. *Brown v. Ohio*, 432 U.S. 161, 165 (1977). *See Gore v. United States*, 357 U.S. 386 (1958); *Bell v. United States*, 349 U.S. 81 (1955); *Ex Parte Lange*, 85 U.S. (18 Wall.) 163 (1874).

The fifteen-year sentence that petitioner was serving on the attempted robbery conviction was completed by commutation of sentence on June 16, 1981. (Court's Exhibit A) When the [C]ircuit [C]ourt of the City of St. Louis vacated the fifteen-year sentence on June 24, 1982, the attempted robbery in the first degree sentence had already been successfully completed. The Missouri Court of Appeals and respondent in this case appear to conclude that because petitioner's conviction for attempted robbery first degree was vacated and then petitioner's entire time of incarceration was credited on the life sentence for the first degree felony murder conviction, that petitioner's constitutional rights and guarantee against double jeopardy were not violated. This court does not agree.

Since the historic case of *Ex Parte Lange*, 85 U.S. 163 (1873), the courts have recognized that no man can be twice lawfully punished for the same offense. *Ex Parte Lange*, *supra*, 85 U.S. at 168. Lange had been found guilty of stealing mail bags. He was sentenced by a

judge to one year['s] imprisonment and a $200.00 fine, although the relevant statute provided that the maximum punishment allowed by the statute was imprisonment of one year or a $200.00 fine. The Supreme Court concluded that the lower court had erred "in imposing the two punishments mentioned in this statute when it had only the alternative of one of them." *Ex Parte Lange*, *supra*, 85 U.S. at 174. The Supreme Court concluded that to sentence Lange to one year['s] imprisonment and require him to pay the fine was a violation of the [D]ouble [J]eopardy [C]lause. In addition, the court added that since Lange had fully satisfied one of the punishments, the fine, the court could no longer legally vacate the sentence of paying the fine and then resentence Lange to imprisonment of one year. The court stated:

> We are of the opinion that when the prisoner . . . by reason of a valid judgment, had fully suffered one of the alternative punishments to which alone the law subjected him, the power of the court to punish further was gone. 85 U.S. at 176.

This court is of the same opinion regarding the case at bar.

The state court, in attempting to amend the illegal sentence that was imposed, vacated the conviction and sentence that had already been fully satisfied. The amendment of the sentence by the state court could not avoid the satisfaction of the judgment, and the attempt to accomplish that end would be a nullity. Since petitioner has fully satisfied one provision of the original sentence, he is entitled to be freed of further restraint. *In re Bradley*, 318 U.S. 51, 52 (1943).

The defendant, *In Re Bradley*, *supra*, 318 U.S. 50, had, as the defendant in *Ex parte Lange*, been erroneously

sentenced to a fine and imprisonment where the statute called for a fine or imprisonment. The situation in this case is not the same, but this court contends it is analogous to *Lange* and *Bradley*. The defendant here was sentenced to two consecutive sentences, not to both alternatives of a punishment as in *Lange* and *Bradley*. However, the same principle controls each of these cases: once there has been a legal satisfaction of part of the sentence, any effort to enforce the second part/alternative of the sentence would subject the defendant to double jeopardy.

The case most closely resembling the one at hand is *United States v. Edick*, 603 F.2d 772 (9th Cir. 1979). In that case, the Ninth Circuit held that the defendant Edick had been illegally sentenced by the imposition of consecutive sentences for violations of the National Firearms Act, as the imposition of cumulative sentences was not authorized by the statute. *Edick* at 775. As in the case at bar, it was the consecutive nature of two separate sentences which caused the illegal cumulation of punishment. Edick, as the petitioner in this case, had fully satisfied one part of his illegal sentence before seeking to correct the illegal sentence by motion. The Ninth Circuit determined "that the district court lost the power to resentence Edick on Count II once he had satisfied his sentence on Count I." *United States v. Edick, supra*, 603 F.2d at 778. It is the contention of this court that the same result should lie in this case. After the petitioner in this case had fully satisfied the fifteen-year sentence for attempted robbery, the state court vacated the sentence. This court believes that by waiting until the sentence was completed, the state court lost any power to vacate the sentence already served.

The Eighth Circuit's decision in *Holbrook v. United States*, 136 F.2d 649 (8th Cir. 1943), supports this conclusion. In *Holbrook*, the petitioner received illegal consecutive sentences of twenty years and five years under the bank robbery statute. The Eighth Circuit Court of Appeals remanded the case, instructing the district court to vacate one of the two sentences. Holbrook claimed he should be entitled to release on the strength of *Ex Parte Lange, supra*, 85 U.S. 163[,] and *In Re Bradley, supra*, 318 U.S. 50, because he had served more than five years. Holbrook though had been specifically sentenced to serve the twenty-year sentence first, followed by the five-year sentence. Thus, Holbrook had not satisfied either of his sentences. The Court of Appeals stated,

> Since neither sentence of itself is invalid by the terms of the statute, and the only invalidity in the situation derives from the constitutional prohibition against double jeopardy or punishment, justice and reason dictate, in such a case, that the court and not the defendant shall have the right to say which of the two consecutive sentences, contemporaneously imposed and both unexecuted, shall be eliminated in order not to subject the defendant to the possibility of double punishment. That question may properly be determined by the trial court up to the time there has been a legal satisfaction of one of the sentences and appropriate action may be taken to vacate the sentence which the court concludes should be voided, in order not to impinge against the defendant's right against double punishment.

Holbrook v. United States, supra, 136 F.2d at 652.

The case at bar differs from *Holbrook* as here the petitioner fully satisfied one sentence, by commutation,

before the court vacated the sentence. The court in *Holbrook* explicitly stated that one of the two sentences could be vacated only *"up to the time there has been a legal satisfaction of one of the sentences."* *Holbrook v. United States*, 136 F.2d at 652 (emphasis added).

The petitioner here had fully satisfied the attempted robbery sentence before the circuit court vacated it. If the petitioner's sentence for attempted robbery had been vacated before he satisfied the sentence, there would not be a double jeopardy problem now. But the petitioner's guarantee against double jeopardy has been violated by the state court['s] vacating a sentence that was already satisfied.

The power of the court to punish petitioner further was exhausted when his fifteen-year sentence was completed by commutation of sentence on June 16, 1981. *Holbrook v. United States, supra*, 136 F.2d at 652. The vacation of the same fifteen-year sentence on June 24, 1982[,] was thus a nullity.

It is the opinion and recommendation of this court that as petitioner has fully satisfied one sentence, the state court was without power to vacate the same sentence and cause petitioner to serve life imprisonment for the same conviction. Accordingly, it is the recommendation of this court that petitioner's writ of habeas corpus be granted.

The parties are advised that they have ten days to file objections to this review and recommendation. 28 U.S.C. § 636(b).

/s/ Robert D. Kingsland
Robert D. Kingsland
United States Magistrate

Dated this 29th day of March, 1985.

(September 27, 1983)

Larry P. THOMAS,
Movant-Appellant,

v.

STATE of Missouri,
Respondent.

No. 46164.

Missouri Court of Appeals,
Eastern District,
Division Five.

Sept. 27, 1983.

Motion For Rehearing and/or Transfer to Supreme Court Denied Feb. 17, 1984.

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* * *

JOHN E. PARRISH, Special Judge.

Movant Thomas was convicted of murder in the first degree (felony-murder) and of attempted robbery first degree by means of a dangerous and deadly weapon. Movant was sentenced in accordance with the Second Offender Act to life imprisonment with respect to the murder first degree and to fifteen years on the charge of attempted

robbery first degree. The terms of imprisonment were ordered to run consecutively.

Following his trial, convictions and sentencings, movant appealed. His sentences were affirmed. *State v. Thomas*, 522 S.W.2d 74 (Mo.App.1975).

Thereafter, movant filed a motion to have his sentences set aside under Rule 27.26. That motion was denied and an appeal taken. Following determination that the transcript on appeal did not contain all the testimony presented before the trial court, the judgment of the trial court was vacated and the motion remanded for a new hearing.

Movant filed an amendment to his Rule 27.26 motion[,] and, [sic] thereafter, evidentiary hearing was held. Following the hearing and entry of the trial court's written Findings of Fact and Conclusions of Law, that court vacated movant's conviction for attempted robbery first degree. In all other respects[,] movant's 27.26 motion was denied. The trial court's decree vacating the attempted robbery first degree conviction and denying the other relief sought by movant's 27.26 motion was entered June 24, 1982. Movant now appeals that judgment.

Movant presents four points by which he contends the trial court erred in failing to set aside his conviction for murder first degree. He contends: (1) that a confession admitted as evidence was given involuntarily for the reason that he was under medication and in pain when it was obtained; (2) that he was denied effective assistance of counsel in that movant's trial counsel failed "to interview hospital officials and introduce hospital records showing appellant was under medication;" (3) that the sentencing of movant for murder first degree subjected him to double jeopardy and because movant had completed serving his sentence for attempted robbery first degree when that sentence was vacated, the trial court was without authority to resentence and should have also vacated his murder first degree sentence; and, (4) that the trial court's overruling movant's motion to pay for services of a physician to evaluate medical records and present testimony, which expenses movant's appointed attorney was unable to pay, deprived him of a fair hearing on the issue of voluntariness of the confession which was admitted in evidence at the criminal trial.

We affirm.

This appeal is considered in light of applicable procedural concepts. Movant's allegations in his 27.26 motion are not "self-proving." *Ward v. State*, 451 S.W.2d 79, 81 (Mo.1970). He has the burden of proving his asserted grounds for relief by a preponderance of the evidence. Rule 27.26(f); *Collins v. State*, 450 S.W.2d 186, 187 (Mo. 1970); *McLallen v. State*, 543 S.W.2d 813 (Mo.App.1976).

Movant first asserts that error occurred in not setting aside the first degree murder conviction because his oral confession to the crime was improperly obtained. He contends that, [sic] at the time the confession was obtained, he was under medication and in pain and the confession was therefore "not the product of rational intellect and free will and should have been excluded from the evidence at trial."

This point was raised and determined adverse to movant in the direct appeal from his criminal conviction. *State v. Thomas*, supra. He is not entitled to relitigate that issue now. A post-conviction proceeding is not a "substitute for a second appeal." Rule 27.26(b)(3); *Richards v. State*, 495 S.W.2d 442, 443 (Mo.1973). "Once a

point has been considered on direct appeal, it may not be reconsidered in a post-conviction proceeding." *Wilhite v. State*, 615 S.W.2d 506, 507 (Mo.App.1981).

Movant's first assignment of error is denied.

Movant's second assignment of error asserts that he did not receive effective assistance of counsel. Movant asserts that his trial counsel failed to effectively investigate his criminal case in preparing for its defense.

Movant's convictions resulted from events which occurred November 7, 1972. He and a companion entered an auto parts store and announced a holdup. Movant had a gun in his hand. A customer in the store was also armed. The customer pulled his gun and exchanged shots with movant. Both were wounded. The customer died from his wounds. Movant survived and was hospitalized for treatment of injuries he received from gunshot wounds. *State v. Thomas*, supra at 75.

The oral confession of movant[,] which was a part of the evidence at his criminal trial[,] was obtained from movant while he was hospitalized. Detectives obtained the confession two days after movant was shot. Movant's trial counsel sought unsuccessfully to suppress the confession. The only testimony the state presented at the suppression hearing was that of the two detectives who obtained the confession. Movant presented no additional evidence. He did not testify as to his condition nor [sic] introduce his medical records. *State v. Thomas*, supra at 76-77.

Movant contends his trial counsel provided inadequate assistance by failing to pursue the defense that the confession was involuntary due to movant['s] having been under medication when the confession was obtained and by failing to interview hospital authorities and to obtain hospital records for purposes of developing that defense.

The record on appeal does not support movant's second point.

Movant's trial counsel testified at movant's 27.26 hearing. He recalled having inspected the hospital records in preparing for movant's case and [in] talking "to somebody on the nursing staff." Movant also produced copies of the hospital records which were admitted in evidence upon the testimony of one of the medical record custodians that the records were valid business records of the hospital where movant was treated.

Movant offered no other evidence on this point.

To support his ineffective assistance of counsel allegation, movant must demonstrate that his trial counsel failed to exercise customary skills and diligence required of a reasonably competent attorney. Movant has the burden of showing that his counsel, through his actions or inactions, prevented movant from presenting evidence that would have been helpful to him at trial and, further, that the actions or inactions were of such character as to result in a substantial deprivation of his right to a fair trial. *Myrick v. State*, 507 S.W.2d 42 (Mo.App.1974). The burden to show ineffective assistance of counsel is a "heavy" one. *Cole v. State*, 573 S.W.2d 397, 401 (Mo.App.1978); *Stevens v. State*, 560 S.W.2d 599, 600 (Mo.App.1978); *Pickens v. State*, 549 S.W.2d 910, 912 (Mo.App.1977); *Lahmann v. State*, 509 S.W.2d 791, 794 (Mo.App.1974). Further, a movant who asserts ineffective assistance of counsel based upon inadequate investigation must show that a fuller investigation would have uncovered evidence which would have improved his trial position and that he

was deprived of substantial evidence by counsel's neglect. *Cole v. State*, supra at 401; *Bibee v. State*, 542 S.W.2d 540, 541 (Mo.App.1976).

Movant failed to demonstrate ineffective assistance of counsel. His second assignment of error is not well taken and is denied.

Movant next asserts that his conviction for murder first degree should be vacated for the reason that it subjected him to double jeopardy in violation of the [F]ifth and [F]ourteenth [A]mendments to the United States Constitution.

Movant's conviction for attempted robbery first degree was vacated following the 27.26 hearing which produced this appeal. That action was taken in accordance with the principles set forth in *State v. Morgan*, 612 S.W.2d 1 (Mo. banc 1981), viz., that the legislature did not intend to allow separate and cumulative punishments for felony-murder and the underlying felony which produced the homicide.

Movant apparently asserts that the sentencings themselves are what subjected him to double jeopardy. He contends that the trial court was required to vacate both sentences and thereafter consider resentencing. He asserts that he had completed the sentence for attempted robbery first degree before the trial court vacated that sentence and contends, under those circumstances, that the trial court would have no jurisdiction to resentence him for the murder first degree offense. He concludes that a resentencing for murder first degree would twice place him in jeopardy for the same offense.

We do not agree. The procedure followed by the trial court did not prejudice movant. His entire time of incarceration is credited on the life sentence he is presently

serving for murder first degree. The trial court properly vacated the conviction for the underlying felony and left the conviction for murder first degree intact.

Movant's third assignment of error is denied.

Movant's fourth assignment of error relates to his present appointed counsel's request for an advance payment of funds to employ an expert to evaluate medical records and testify. In pursuit of the claim that movant's oral confession which was admitted as evidence at trial was involuntarily given, movant's appointed counsel filed a "Motion for Payment of Expenses in Advance of Testimony." That motion sought an advancement of funds with which to employ a physician. The services for which a physician was sought included evaluation of movant's medical records and presentation of testimony. That motion was submitted to the trial court without oral argument. The trial court, by its memorandum entry, considered and overruled the motion.

Movant now asserts that submission of his 27.26 motion "without medical testimony severely prejudiced appellant's [movant's] right to a fair trial. . . ." He contends that *State ex rel. Wolff v. Ruddy*, 617 S.W.2d 64 (Mo. banc 1981), cert. denied, 454 U.S. 1142, 102 S.Ct. 1000, 71 L.Ed.2d 293, required the trial court to determine whether the expenses for which the advancement was sought were necessary. He complains that the trial court made no finding that they were not.

We rule against movant on this point.

The issue of the voluntariness of movant's confession was determined on direct appeal. Thus, for the reasons given in denying movant's first assignment of error, he was not entitled to relitigate that point. The only remaining issue to which the expert testimony of a physi-

cian might be relevant is movant's second assignment of error regarding alleged ineffective assistance of counsel.

Movant's medical records were admitted in evidence at the evidentiary hearing on movant's 27.26 motion held March 27, 1981. Movant's counsel indicated a desire for additional time to seek review of those records by a physician. The trial court accommodated that request with his stated understanding that, ". . . I'll be waiting to hear from you on that, won't I?"

On May 4, 1981, movant's "Motion for Payment of Expenses in Advance of Testimony" was filed. On August 14, 1981, the parties agreed for the motion to be submitted to the trial court without argument. They further agreed to a schedule for their submission of memoranda on the other issues before the trial court. On August 14, 1981, the trial court overruled the "Motion for Payment of Expenses in Advance of Testimony."

This sequence of events afforded movant adequate opportunity to address the issue of whether the expenses for which advancement was sought were necessary. The trial court considered what was presented to him. His overruling the "Motion for Payment of Expenses in Advance of Testimony" on August 14, 1981, after having received evidence at an earlier date (including the medical records of movant) was a sufficient finding that the expenses for which an advance was sought were not necessary. *State ex rel. Wolff v. Ruddy,* supra, required nothing more under the circumstances in this case.

Movant's fourth assignment of error is denied.

Judgment affirmed.

PUDLOWSKI, P.J., and JAMES A. FINCH, Jr., Senior Judge, concur.

STATE OF MISSOURI)
) SS.
CITY OF ST. LOUIS)

(Filed June 24, 1982)

IN THE
CIRCUIT COURT OF THE CITY OF ST. LOUIS
STATE OF MISSOURI

P.C.R. No. 780
(Cause No. 72-2632)
Division No. 6

LARRY P. THOMAS a/k/a
LARRY THOMAS,
Movant-Defendant,

vs.

STATE OF MISSOURI,
Respondent-State.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER OF COURT

A STATEMENT OF THE HISTORY OF THIS RULE 27.26 MOTION

This cause, Post Conviction Remedy Number 780, is before this Court on a Motion to Vacate Judgment and Sentence filed by the Movant-Defendant, Larry P. Thomas, under Supreme Court Rule 27.26. The Movant seeks to have set aside the judgment of conviction and sentence

imposed on him on May 25, 1973, in Division No. 19 in the Circuit Court of the City of Saint Louis. The Movant processed an unsuccessful appeal and the judgment was affirmed on February 11, 1975, and a corrected mandate was entered on June 24, 1975, in Cause No. 72-2632.

On February 7, 1977, the Movant filed the present motion and the matter was assigned to Judge Richard J. Mehan. After various proceedings and hearings[,] this Court entered an order on November 8, 1977, overruling the motion and dismissing it with prejudice. See the attached copy of the Findings of Fact, Conclusions of Law and Order of Court dismissing that motion on November 8, 1977. The same is incorporated herein and made a part of these Findings of Fact, Conclusions of Law and Order of Court.

Following the entry of that order on November 8, 1977, the Movant appealed in forma pauperis on December 8, 1977. During the process of appeal and on June 3, 1980, the Missouri Court of Appeals, Eastern District, entered a mandate requiring this Court to hold an evidentiary hearing directed to a contention by the appellant that the transcript was not complete as certain evidence taken by this trial court was not contained in the transcript. See the attached copy of said mandate. The same is incorporated herein and made a part of these Findings of Fact, Conclusions of Law and Order of Court.

Pursuant to that mandate[,] this Court held certain hearings and then reported to the Missouri Court of Appeals, Eastern District, by its order of December 19, 1980. See the attached copy of said order. The same is incorporated herein and made a part of these Findings of Fact, Conclusions of Law and Order of Court.

On January 15, 1981, the Missouri Court of Appeals, Eastern District entered its mandate that the judgment in this cause of November 8, 1977, overruling and dismissing with prejudice the Movant's Motion for Post Conviction Relief, be vacated. That Court also remanded the cause to this Court for a new hearing on the Movant's Rule 27.26 Motion. See the attached copy of the mandate of the Missouri Court of Appeals dated January 15. 1981. The same is incorporated herein and made a part of these Findings of Fact, Conclusions of Law and Order of Court.

Gail N. Gaus acted as the attorney for the Movant. The previous attorney, Michael Gross, Jr., ceased representing the Movant at some point during the appeal process.

On March 27, 1981, an amendment to the Rule 27.26 motion was filed by Attorney Gaus. An evidentiary hearing was held on that date pursuant to the mandate of the Court of Appeals of January 15, 1981.

By consent memorandum of August 14, 1981, the parties agreed that the Motion for Payment of Expenses in Advance of Testimony be submitted to the Court without argument, and they further agreed that the parties were given until August 24, 1981, to submit legal memoranda, and they further agreed that if the Court denied the Motion[,] the entire cause would be submitted on August 24, 1981. On that same day the Court overruled the Movant's Motion for Payment of Expenses in Advance of Testimony.

A memorandum of law in support of his motion under Rule 27.26 was filed on August 31, 1981, with leave of Court.

The parties again appeared by their attorneys on May 3, 1982. Oral argument was received by the Court. The parties were given seven (7) days to file additional legal memoranda. The cause was to be taken as submitted thereafter.

On May 10, 1982, the Movant's attorney filed a legal memorandum in letter form. The cause was taken as submitted on that day.

FINDINGS OF FACT ON THE EVIDENCE PRESENTED AT THE EVIDENTIARY HEARING ON MARCH 27, 1981

At the March 27, 1981 hearing[,] the only evidence presented consisted of direct and cross[-]examination of Larry P. Thomas, Kevin O'Keefe, Claudine Thomas Farmer and Charles Lee. In evaluating that testimony, the Court, where appropriate, has made a comparison with the testimony received at the hearings in 1977.

Larry P. Thomas, the Movant, testified that he was receiving medication for his constant pain which [medication] made him sleepy. The Movant did state he remembered visits on the 9th and 10th of November by the investigating officers to his hospital room when they questioned him. In response to the officers questions on the 10th of November, the Movant stated, "Only thing I remember is telling him that I wanted to talk and falling back to sleep." The Movant further stated that he did not give a statement to the investigating officers. The Movant stated in the 1977 hearing that he vaguely remembered being given his Miranda rights.

The Court here sets out a partial transcript of the Movant's testimony at the 1981 hearing. The Court accepts it as true and finds that it supports the Court's find-

ing that the State had a very strong case for conviction of the Movant on both charges:

> "Q. Isn't it a fact that you were shot during the course of that robbery and found at the scene by the police?
>
> A. Yes.
>
> Q. And found literally underneath the body of the man you had killed?
>
> A. Yes.
>
> Q. Did you also hear the police officers announce that they found you in the store underneath the body of the man that you shot?
>
> A. Yes.
>
> Q. The confession was not the only evidence against you in that entire trial, is that right?
>
> A. Not the only evidence, but without the confession it was a possibility that an indictment of first degree murder wouldn't have been given. I may have been indicted for manslaughter or a lesser included offense without the confession.
>
> Q. Without the confession, but with the other evidence, that you admit existed against you at that time?
>
> A. Right, that I admit."

The above testimony militates against the argument that must be made by the Movant that the outcome of the trial would have been effected [sic] by an exclusion of the confession of the hospital confession. The Court finds no merit in the Movant's contention that the presence

of the confession caused the indictments to be entered as they were. The Court finds that the availability of the confession at the outset of the State Attorney's actions in the case might give it some encouragement and strength for the conclusion that the Movant was guilty of the Murder. The Circuit Attorney with any reasonable degree of proof would have been obligated to seek the indictments.

As to the Motion to Suppress the November 10th statement[,] the Court notes the Movant's testimony on cross[-]examination to the effect that the police officer did testify and that there was cross[-]examination and argument on that motion.

The testimony of Kevin O'Keefe, the Movant's trial attorney, presented at the 1981 hearing[,] did not contradict his testimony presented in the 1977 hearing. In fact, it buttressed the Court's finding that Mr. O'Keefe did not fail as the Movant's attorney in attacking the confession. It gives further support to the Court's belief that the State had a very strong case against the Movant and that the exclusion of the confession would not have saved the Movant's bacon. Mr. O'Keefe presented detailed testimony of the strength of the State's case. He indicated that he is certain he checked the hospital records, talked to the nursing staff and talked with the Movant on a number of occasions.

The Movant's sister, Claudine Thomas Farmer, also testified at the 1981 hearing and the 1977 hearing. She indicated in the 1981 hearing that she did not object to the police officers['] interrogating her brother, but believed that her brother could not communicate with the police officers as their questions were of a more detailed

nature. However, she did admit that before and after the appearance of the police officers[,] she did successfully communicate with the Movant and that he understood that communicating and she relied on his responses. The Court does not accept Claudine Thomas Farmer's version of the lack of communication between the Movant and the investigating officers. She did indicate that the Movant appeared to be in constant pain, sleepy and received medication from time to time in the hospital. But there is no evidence before this Court as to the effective period of the medication and actual effect of this medication on the Movant. Claudine Thomas Farmer did admit that a conversation was held between the police officers and the Movant, but that she was unable to hear what was being said.

Charles Lee, the Custodian of Records, Clerk I, of Homer G. Phillips Hospital, testified on Movant's Exhibits 1 and 1A, the original and a copy of the hospital records of Larry P. Thomas respectively, as business records under the Uniform Business Records as Evidence Act. Movant's Exhibit 1A was offered and accepted in evidence and considered by the Court.

The Court makes these additional findings of fact on the evidence produced at the 1981 hearing:

The Court finds no reason or fact to vary, change, alter or modify the findings of fact it made in its Order dated November 8, 1977.

Further, the Court does not find as a result of the evidence adduced at the 1981 hearing that the Movant was physically or mentally unable to understand the circumstances of the statement made to the police officers

made by him at the hospital or the questions put to him or the answers he gave to those officers.

The Movant did not prove from his evidence offered at the 1981 hearing that his physical or mental condition resulting from medication, pain, other medical treatment or from the injuries he received was such that his confession to the officers should not have been admitted into evidence at the trial.

The Court does not find that the Movant proved from the 1981 evidence that the trial would have ended in a different result if his confession had not been introduced.

The Court does not find that the Movant proved in the evidence adduced at the 1981 hearing that his Attorney failed to properly investigate the circumstances of the confession, the Movant's medical condition at the time and pursue the opportunity to prevent the admission of the confession.

The Court does not find that the Trial Counsel is guilty of ineffective assistance or that the confession should have been excluded or that the exclusion of the confession would have produced a difference [sic] result in the trial.

CREDIBILITY OF WITNESS AND BURDEN OF PROOF

This trial Court has the right and the duty[,] after full consideration of all the relevant facts[,] to determine the credibility of all the witnesses offered at the two evidentiary hearings. It can reject testimony even if there is no contrary evidence. *Hicks vs. State,* 544 S.W.2d 79

(Mo.App. 1976). This Court has considered[,] and finds applicable here the presumption that the Movant's attorney was competent and that the Movant has not overcome that presumption. *Cox vs. State,* 572 S.W.2d 631 (Mo. App. 1978).

Further, this Court has applied the standards set out in *Seales vs. State,* 580 S.W.2d 733 (Mo. 1979), and finds the Movant was not denied effective assistance. This Court further finds that the Movant did not show how certain, [sic] alleged omissions by his attorney would have helped his defense[,] as was his burden. *Roscoe Thomas vs. State of Missouri,* 516 S.W.2d 761 (Mo.App. 1974).

FINDING OF FACT BASED ON ALL OF THE EVIDENCE PRESENTED

Here the Court will make its additional findings of fact which are based on its consideration of all of the evidence presented at all of the evidentiary hearings in 1977 and the one hearing in 1981.

The Court finds that the Movant did not sustain his burden of proof as to any claim set out in the original motion under Rule 27.26 filed on January 24, 1977. (The Court notes that in its order of November 8, 1977, on page 1 thereof in the second paragraph, it incorrectly indicates that said motion was filed on February 7, 1977.)

The Court incorporates here the Findings of Fact of this Court on the evidence presented at the evidentiary hearing on March 27, 1981, and set out hereinabove. Further the Court incorporates here the Findings of Fact set out in its Findings of Fact, Conclusions of Law and Order of Court entered on November 8, 1977.

The court has considered all of the adduced evidence and finds that such inconsistencies as may exist between the evidence produced by the Movant in 1977 and that produced in 1981 work to the detriment of the Movant.

This Court has considered the original motion of January 24, 1977, the amendment to the Rule 27.26 motion filed March 27, 1981, the various written memoranda of law, and the oral arguments made at all times by the parties since February 14, 1977. (At that time the Court held a pre-hearing conference and attorneys appeared on behalf of the parties.)

CONCLUSIONS OF LAW AND ORDER AND DECREE

The Court has now considered all of the pleadings, memorandums, briefs and motions and also all of the evidence adduced at the evidentiary hearings. The Court now vacates and sets aside the conviction of the Movant as to Count I, Attempted Robbery in the First Degree, entered on May 2, 1973. At that time the jury assessed punishment at fifteen (15) years. The Court also vacates and sets aside the sentence of the trial court entered on May 25, 1973, at which time the trial judge sentenced the Movant to fifteen (15) years in the Missouri Department of Corrections on Count I. The conviction of the Movant on Count II, Murder in the First Degree, entered on May 2, 1973, and the sentence by the trial judge of the Movant to life imprisonment entered on May 25, 1973, are to remain in full force and effect and are not to be disturbed by this Order and Decree. The Court now concludes as a matter of law that the Movant is not entitled to any other relief under the law of this State and under

the adduced evidence in this matter. The Movant has not met and carried his burden of proof as to any other of his claims. Accordingly, the Movant's 27.26 motion is overruled and denied in all respects and with prejudice.

DATED: June 24, 1982

SO ORDERED:

/s/ Richard J. Mehan
Richard J. Mehan
Circuit Judge

cc: Gail N. Gaus, Attorney for Movant
Joseph Warzycki, Assistant Circuit Attorney

(February 11, 1975)

STATE of Missouri,
Plaintiff-Respondent,

v.

Larry THOMAS,
Defendant-Appellant.

No. 35486.

Missouri Court of Appeals,
St. Louis District,
Division Two.

Feb. 11, 1975.

Motion for Rehearing or Transfer Denied
April 14, 1975.
As Corrected May 27, 1975.

---

* * *

STEWART, Judge.

Defendant was found guilty of murder in the first degree and of attempted robbery first degree by means of a dangerous and deadly weapon. In accordance with the provisions of the Second Offender Act[,] he was sentenced to life imprisonment with respect to the murder first degree and to fifteen years on the charge of at-

tempted robbery first degree, the terms to run consecutively. We affirm.

While defendant's sole allegation of error is couched in assumptions, fairly read he contends that the trial court erred in admitting his oral confession because he was confined to the hospital as a result of gunshot wounds and was receiving medication when the confession was obtained and he was thus unable to knowingly and understandably waive his constitutional rights.

The sufficiency of the evidence is not contested, [sic] therefore, a brief statement of the facts will suffice.

At approximately 6:15 P.M. on the 8th of November, 1972, Mentoe Vernell went to the Reid Auto Parts Store located at 4750 Martin Luther King Drive to pay his bill. The general manager, a clerk, and Vernell, a regular customer, were the only persons in the store. A short time later the accused and his companion, Fancell Johnson, entered the store. Johnson walked over to the general manager and inquired about auto parts. At this time the defendant announced a holdup. Vernell reached out for the accused who had a gun in his hand. The accused fired four or five shots point-blank at Vernell before Vernell, who was armed, reached into his pants pocket, pulled out a gun, and fired three shots striking defendant in the arm and leg. Defendant and Vernell fell wounded to the floor. The police, who arrived on the scene almost immediately, disarmed the defendant. The defendant and Vernell were then taken to the hospital. Vernell died of the gunshot wounds while enroute to the hospital.

Defendant's motion to suppress the confession was heard by the trial court outside the presence of the jury

and overruled. Further evidence was adduced during the trial. Detective Cox went to the hospital the morning after the shooting and interviewed the defendant in the presence of his sister and a friend who were visiting. Upon being advised of his rights[,] defendant refused to make a statement concerning the occurrence. He did tell Detective Cox that he had recently been released from the penitentiary and also gave him his present address.

The following day Detective Cox returned to the hospital with Detective Burgoon. They first stopped at the nurses' station to determine whether the defendant could be interviewed. Defendant was listed as in serious condition and was receiving medication for pain and infection. Upon receiving permission, they went to defendant's bedside. They passed the time of day with him and noted that he was "alert". Defendant was then read the Miranda rights by Detective Cox. Defendant advised Cox that he understood his constitutional rights. Detective Cox informed the defendant that the gun involved in the shooting was probably the same gun that had been used in a robbery earlier the same day. Defendant, at that time, advised the officers that he had not been involved in the earlier robbery[,] but that he was involved in the robbery at Reid Auto Parts and made a full statement in which he told the officers that he obtained the weapon from his accomplice on the afternoon of November 8th, shortly before they went to the Reid Auto Parts store; that upon entry to the store he announced "stick-up"; that the deceased, Mr. Vernell, turned around and began to reach into his pocket, at which time the defendant shot him. There was no evi-

dence of physical force, coercion, promises or threats used in obtaining the statement of the defendant.

The two detectives were the only persons who testified at the hearing. The court found that defendant had been properly advised of his rights under the ruling in Miranda[1] and that the confession was voluntary.

Defendant was in custody at the time the confession was obtained, [sic] therefore, the State had the burden of proving that the confession was voluntary. State v. Williams, 369 S.W.2d 408 (Mo.Banc 1963). The State, however, is not required to negative every possible circumstance which[,] if developed[,] would present an issue of fact as to whether the confession was voluntary. State v. Nolan, 423 S.W.2d 815 (Mo. 1968). There is no prohibition against a seriously wounded person['s] confessing to the commission of a crime. State v. Granberry, 484 S.W.2d 295 (Mo.Banc 1972). The confessions of intoxicated persons have been admitted into evidence. State v. Smith, 342 S.W.2d 940 (Mo. 1961); State v. Heather, 498 S.W.2d 300 (Mo.App. 1973). It has also been held that the fact that medicines or drugs have been administered to one who confesses does not necessarily render the confession involuntary. State v. Alvis, 70 Wash.2d 969, 425 P.2d 924 (1967); People v. Harrison, 41 Cal.2d 216, 258 P.2d 1016 (1953). The ultimate question to be determined is whether the statement is the result of a rational intellect and a free will and thus voluntary. State v. Heather, *supra* [6]. The State carries its burden by a prima facie showing that the statement is voluntary. State v. Nolan, *supra* [9].

---

1. *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

The procedure in this State complies with the standards of Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964). It provides an opportunity to fully explore the facts concerning the voluntariness of a confession outside the hearing of the jury. The defendant is free to bring in any evidence he desires to contradict the testimony of the law enforcement personnel, [sic] without prejudice to defendant in the trial on the issue of guilt. He is free to testify on his own behalf without waiving his privilege against self-incrimination.

On the day before the confession was made[,] defendant was in condition to receive visitors. His sister and a friend were at the hospital. He was sufficiently rational to understand his right to remain silent. In fact[,] he exercised that right. On the following day[,] the detectives obtained permission to interview the defendant from the nurse on duty, a tacit indication of his condition. The detectives found him to be alert and[,] upon reading the standard Miranda warning[,] ascertained that he understood his rights. Defendant presented no additional evidence. He did not testify as to his condition. He did not introduce the medical records which are peculiarly under his dominion. The facts surrounding the confession are uncontradicted. The trial court committed no error in admitting the confession.

The judgment is affirmed.

SMITH, C. J., and KELLY, JJ., concur.

COMMUTATION OF SENTENCE

STATE OF MISSOURI

TO ALL WHO SHALL SEE THESE PRESENTS, GREETING:

KNOW YE THAT, Whereas, LARRY THOMAS 21220 was on Cause Nos. 319577, 662-T, 72-2532 10/12/71, 10/14/71, 5/25/73 in the Circuit Court of ST. LOUIS CITY AND County convicted of the crime of PG: ROBBERY FIRST DEGREE BY MEANS OF DANGEROUS AND DEADLY WEAPON, ATTEMPTED ROBBERY FIRST DEGREE BY MEANS OF DDW, TC: ATTEMPTED ROBBERY FIRST DEGREE (5,4,15cc) and whose punishment was assessed at 15 years in the Department of Social Services, Division of Corrections.

Now, therefore, I, CHRISTOPHER S. BOND, Governor of the State of Missouri, by virtue of authority in me vested and for good and sufficient reasons appearing, do hereby commute the sentence of the abovementioned recipient hereof, to a term ending June 16, 1981.

In Witness Whereof, I hereunto set my hand and there is hereunto affixed the Great Seal of the State of Missouri, at the City of Jefferson, State of Missouri, this 12th day of June A.D., 1981.

/s/ Christopher S. Bond
Governor

/s/ James C. Kirkpatrick
Secretary of State

OPPOSITION BRIEF

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

Supreme Court, U.S.
FILED
NOV 23 1988
JOSEPH F. SPANIOL, JR.
CLERK

Case No. 88-420

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

JIMMY JONES, SUPERINTENDANT,
MISSOURI TRAINING CENTER
FOR MEN at Moberly, Mo.,

Petitioner,

vs.

LARRY P. THOMAS,

Respondent.

RESPONDENT'S PETITION TO PROCEED IN FORMA PAUPERIS

Now comes Respondent, by his undersigned attorney, and states that he has been indigent and without suffiiently substantial funds throughout the course of this long case to pay any reasonable fee to an attorney. As evidence thereof he attaches hereto and here incorporates by reference the finding of indigency made by U. S. Magistrate William S. Bahn, a copy of the letter of the Clerk of the U. S. Court of Appeals for the Eight Circuit notifying the undersigned attorney that said attorney has been appointed to represent Larry P. Thomas undeer the Criminal Justice Act, a later appointment after the 8th Circuit had ordered the District Court to issue the writ of habeas corpus, by which the Hon. Stephen Limbaugh, district judge, appointed the undersigned attorney after Judge Limbaugh had temporarily stayed the writ.

2. Larry P. Thomas is still without sufficient funds to pay a reasonable attorney fee for representation in the U. S. Supreme Court, and the expenses which are being and will be incurred in connection with such representation.

WHEREFORE, Respondent Thomas, by the undersigned attorney, prays that the Court grant him leave to proceed in forma pauperis, Under Supreme Court Rule 46,
/and to file his brief in forma pauperis. He also prays Springfield Baldwin be appointed to represent him.

2. Springfield Baldwin, the undersigned attorney, who was appointed to represent Respondent Thomas in the Courts below, hereby consents, and indeed requests, he be appointed. He also

states he is a member of the bar of the Supreme Court of the United States, having received a certificate with the Court's seal and signed by the then Clerk of the Court, Mr. Alexander L. Stevas on April 29, 1985.

RESPECTFULLY SUBMITTED,

Springfield Baldwin

SPRINGFIELD BALDWIN,
Attorney for Respondent Larry P. Thomas, with said attorney acting as such by appointment by the U. S. Court of Appeals for the Eighth Circuit under the Criminal Justice Act. (also a member of the bar of the Supreme Court of the United States)
53 St. Charles Pl.
Shrewsbury, Missouri 63119
781-4080

CERTIFICATION OF SERVICE

I, Springfield Baldwin, an attorney admitted to the bar of the Supreme Court of the United States, hereby certify that on this 23rd day of November, 1988, I mailed one true copy of the above petition to procede in forma pauperis to the attorneys of record for the Ceriorari Petitioner, Jimmy Jones, Superintendant, by mailing said copy in an envelope addressed to said attorneys who are William L. Webster, Attorney General of Missouri and his two Assistant Attorney Generals, John P. Morris III and Stephen D. Hawke, at their address of record of P. O. Box 899, Jefferson City, Mo. 65102, and said copy and envelope were mailed by first class pre-paid U. S. Mail.

Springfield Baldwin

SPRINGFIELD BALDWIN, Attorney for Respondent Larry P. Thomas

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI

Larry P. Thomas
v.
Terry Morris

FILED
1984
EVVON MEYERKAMPELL
U. S. DISTRICT COURT
E. DISTRICT OF MO.

84-1760-C-5

ORDER/RECOMMENDATION OF UNITED STATES MAGISTRATE
CONCERNING IN FORMA PAUPERIS STATUS

[X] Petitioner, having shown an inability to pay the filing fee for the commencement of this action,

IT IS HEREBY ORDERED that the Clerk receive and file the complaint in this action without the payment of the required filing fee. 28 U.S.C. §1915(a).

[ ] Petitioner, having failed to show an inability to pay the filing fee for the commencement of this action,

IT IS RECOMMENDED that the District Court not allow the commencement of this action without the payment of the required filing fee.

[ ] Petitioner having shown an inability to pay the filing fee for the commencement of this action,

IT IS HEREBY ORDERED that the Clerk receive and file the complaint in this matter without the payment of the required filing fee, however, the Clerk shall not issue process upon said complaint, but shall submit the matter to the District Court for a determination of whether process and summons shall issue upon the complaint, since the complaint

William S. Bahe

UNITED STATES MAGISTRATE

Dated: 7/31/84

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

LARRY P. THOMAS,)
)
Plaintiff,)
)
vs.) No. 84-1760 C (5)
)
JIMMY JONES, Superintendent)
of the Missouri Training Center)
for Men,)
)
Defendant.)

ORDER

IT IS HEREBY ORDERED that Springfield Baldwin, 818 Olive, Suite 1240, St. Louis, Mo. 63101 is appointed to represent Mr. Thomas in this cause of action.

IT IS FURTHER ORDERED that the Clerk of the Court shall send a complete copy of the file in this case to Mr. Baldwin.

Dated this 29th day of June, 1988.

UNITED STATES DISTRICT JUDGE

United States Court of Appeals
For The Eighth Circuit

Robert D. St. Vrain
Clerk

U.S. Court & Custom House
1114 Market Street
St. Louis, Missouri 63101

314-425-5600
FTS: 279-5600

August 1, 1985

Mr. Springfield Baldwin
Attorney at Law
818 Olive Street
St. Louis, MO 63101

Re: No. 85-1934EM Larry P. Thomas, Appellant vs.
Terry Morris, Appellee.

Dear Mr. Baldwin:

We have received certified copies of notice of appeal and docket entries from the Clerk of the United States District Court. In accordance with Rule 24(a), Federal Rules of Appellate Procedure, the appeal has been docketed under the number indicated.

Enclosed is CJA Form 20 which provides for your appointment to represent this appellant under the provisions of the Criminal Justice Act. Your attention is directed to this Court's Plan to Implement the Criminal Justice Act of 1964, and Criminal Justice Act Revision, effective October 12, 1984, regarding compensation. Carefully read the instructions on the form and the attached notice, before processing your voucher. The voucher should be submitted to this office after the case is closed and mandate issued.

If you have any qeustions concerning your appointment, please call this office. This appointment is personal and cannot be delegated to someone else without prior court approval.

Sincerely,

ROBERT ST. VRAIN, CLERK

by
Deputy Clerk

dlb

Enclosures

cc: (see attached listing)

Case No. 88-420

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

JIMMY JONES, SUPERINTENDANT, MISSOURI
TRAINING CENTER FOR MEN AT MOBERLY, MO.,

Petitioner,

vs.

LARRY P. THOMAS,

Respondent.

AFFIDAVIT OF MAILING OF BRIEF OF RESPONDENT, AND OF RESPONDENT'S PETITION TO PROCEED IN FORMA PAUPERIS

Now comes Springfield Baldwin, attorney appointed by the United States Court of Appeals to represent Larry P. Thomas (now the Respondent) under the Criminal Justice Act, and being duly sworn, he states upon his oath that on this 23rd day of November, 1988 he has mailed by pre-paid first class U. S. Mail ten copies of the orange covered BRIEF OF RESPONDENT (IN FORMA PAUPERIS PROCEEDING UNDER SUPREME COURT RULE 46), and one copy of RESPONDENT'S PETITION TO PROCEED IN FORMA PAUPERIS, to Mr. Joseph F. Spaniol, Jr., Clerk of the Supreme Court of the United States, in a package addressed to him at his office at #1 1st Street, N.E., Washington, D.C. 20543.

Springfield Baldwin
SPRINGFIELD BALDWIN,
Court-appointed attorney for
Respondent Larry P. Thomas
53 St. Charles Pl.
Shrewsbury, Missouri 63119
(314) 781-4080

STTE OF MISSOURI)
COUNTY OF ST. LOUIS) SS.

Before me on this 23 day of November, 1988, appeared Springfield Baldwin, an attorney personally known to me, and being duly sworn by me, he stated upon his oath that the foregoing facts are true.

Angela F. Heintz
NOTARY PUBLIC

ANGELA F. HEINTZ
NOTARY PUBLIC—STATE OF MISSOURI
ST. LOUIS CITY
MY COMMISSION EXPIRES OCT. 4, 1992

My commission expires October 4, 1992

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

JIMMY JONES, SUPERINTENDANT, MISSOURI
TRAINING CENTER FOR MEN AT MOBERLY, MO.,

Petitioner,

vs.

LARRY P. THOMAS,

Respondent.

On Petition for Certiorari to the United States
Court of Appeals for the Eighth Circuit

BRIEF OF RESPONDENT (IN FORMA PAUPERIS
PROCEEDING UNDER SUPREME COURT RULE 46)

SPRINGFIELD BALDWIN,
Attorney appointed for
Respondent Thomas by the
U. S. Court of Apps., 8th Cir.
(also a member of the Bar of
the Supreme Court of the U.S.)
53 St. Charles Pl.
St. Louis, Mo. 63119
(314) 781-4080

THE QUESTION PRESENTED

Respondent emphatically disagrees with Petitioner's statement of the question presented, so as required by S.Ct.Rule 21, and permitted by S.Ct.Rule 34(a), Respondent restates the question, as follows:

> Where the criminal defendant is convicted of felony murder in the course of attempted robbery, and also of its lesser included offense of attempted robbery, and admittedly in violation of the double jeopardy clause receives a fifteen year sentence for the attempted robbery and life imprisonment for the murder, with the fifteen year sentence to be served FIRST, and after serving part of the fifteen year sentence it is commuted by the Governor, does it violate the Double Jeopardy Clause of the United States Constitution for the State court to set aside the fully served commuted sentence and enforce the life imprisonment sentence, that is, does fully serving the commuted sentence satisfy the judgment so that the court's power to further punish the defendant is gone, and further punishment violates the double jeopardy clause?

PARTIES TO THIS ACTION

Respondent Larry Thomas was an indigent Missouri prisoner who is presently free under a writ of habeas corpus obtained from the U. S. District Court for the Eastern District of Missouri, but only after the United States Court of Appeals for the Eighth Circuit had decided said District Court should issue the writ.

The undersigned attorney, Springfield Baldwin, was appointed under the Criminal Justice Act by the United States Court of Appeals for the Eighth Circuit to represent Respondent.

The undersigned attorney is a member of the Bar of the Supreme Court of the United States.

Petitioner Jimmy Jones is the Superintendant of the Missouri Training Center for Men at Moberly, Missouri where Respondent Thomas was incarcerated prior to obtaining his freedom under writ of habeas corpus.

Petitioner is represented by the Attorney General of Missouri William L. Webster, and his Chief of Criminal Division, Assistant Attorney General John M. Morris, and Assistant Attorney General Stephen D. Hawke.

Respondent Thomas' petition to file a brief in forma pauperis was concurrently filed with this brief.

REFERENCES

Respondent will refer to the Appendix pages of Petitioner's Petition for Certiorari using the letter "A" followed by the page number. Where necessary, Respondent will included additional pages at the end of this brief which will be numbered with the letter "B" followed by the page number. The Court has not yet ordered a joint appendix printed up.

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CITATIONS TO OPINIONS AND JUDGMENTS DELIVERED IN THE COURTS BELOW (REQUIRED BY S.CT.RULE 34[d])

The Courts below delivered the following opinions:

References beginning with the letter "A" are to Petitioner's Appendix.

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Opinion of the U. S. Ct. of Appeals for the 8th Circuit, En banc, filed 4/21/88 A2

Opinion of the U. S. court of Appeals, 8th Cir., Panel opinion , filed 4/3/87 A24

Order of the U.S. District Court, Eastern Dist. of Mo., Eastern division, filed 6/28/85 A51

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(Opinions and orders of the courts below -- continued)

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Opinion of the Missouri court of Appeals, St. Louis District, filed 5/27/75 (as corrected) A84

Governor's Commutation of Sentence

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Sentence of the trial court of May 25, 1973 Page 23 of this brief

JURISDICTIONAL STATEMENT

See Petitioner's Petition for Certiorari, page 2.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent asserts the /Double Jeopardy Clause of the Fifth Amendment, the Due Process Clause of the Fourteenth Amendment, and the Ex Post Facto Clause of Art.1, Section 10, of the U. S. Constitution are involved. These portions are underlined below.

AMENDMENT [V.]

Capital crimes; double jeopardy; self-incrimination; due process; just compensation for property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XIV.

§ 1. Citizenship rights not to be abridged by states

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Art.1, **§ 10. Restrictions upon powers of states**

Section 10. No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

STATEMENT OF THE CASE

Again, references are used below which refer to the Appendix as compiled with Petitioner's petition for Certiorari. Thus, "A3" refers to third page of said appendix. The court has not yet ordered a joint appendix be compiled, and at this stage it does not seem to be necessary.

"...On November 8, 1972, (Respondent) Thomas, during the course of a robbery of an auto parts store, engaged in a 'shootout' with a customer, who subsequently died from the injuries received. Thomas was convicted of first degree felony murder (murder in the course of attempted robbery) and attempted robbery in the first degree by means of a dangerous and deadly weapon in a jury trial in St. Louis Circuit Court (the state trial court). On May 15, 1973, Thomas was sentenced to life imprisonment for the felony murder and fifteen (15) years imprisonment for the attempted robbery. The sentences were to be served consecutively and the 15-year sentence was to be served first. The Missouri Court of Appeals affirmed the conviction. Thomas v. State, 665 S.W.2d 621 (Mo.Ct.App.1983)." (A3.)

"Thomas filed a Missouri Rule 27.26 motion for post conviction relief in 1977; this motion was denied. On appeal the Missouri Court of Appeals vacated the state trial court's dismissal of the Rule 27.26 motion and remanded the case for a new hearing on the grounds that the transcript on appeal did not include all the evidence adduced at the hearing. After an evidentiary hearing, the state trial court granted Thomas' motion in part and vacated the conviction for attempted robbery. The state trial court held that Thomas' convictions for attempted robbery and felony murder and separate consective sentences for the offenses violated the Double Jeopardy Clause, because the Missouri legislature (A3.) did not intend to allow separate and consecutive punishments for felony murder and the underlying felony. The state trial court left intact Thomas' felony murder

conviction and life sentence (A4).

"On June 1981, Thomas' 15-year sentence for attempted robbery was commuted by the governor.(emphasis supplied.) Thomas had served approximately eight years of the 15-year sentence. On June 24, 1982, one year after the commutation by the governor, the state trial court vacated the 15-year sentence and credited the time Thomas had served prior the court's vacation of the 15-year sentence, to his life sentence for felony murder. The Missouri Court of Appeals affirmed the state trial court's decision in Thomas v. State, 665 S.W.2d 621,625 (Mo.Ct.App.1983)." (A4).

"On August 1, 1984, Thomas filed a petition for a writ of habeas corpusin federal district court (for the Eastern Dist. of Mo.) pursuant to 28 U.S.C. §2254. He contended his confinement as a result of the life sentence violated the Double Jeopardy Clause. The matter was referred to a magistrate, who recommended the writ be issued because Thomas had completed the 15-year sentence for attempted robbery...The magistrate concluded the state trials court did not have jurisdiction to vacate the 15-year sentence and to cause Thomas to serve the life prison sentence for the same conviction."(A4).

"On June 28, 1985, the district court rejected the magistrate's recommendation..." (A4,5)

(An 8th Circuit panel of three judges rendered three opinions.)

"The majority of the panel in three separate opinions reversed the judgment of the district court and remanded the case for resentencing or retrial within ninety days of the issuance of the opinion. Thomas v. Morris, 816 F.2d at 371. Two members of the panel, Judges McMillian and Hanson," (an Iowa Sr. Dist. judge sitting by designation) "agreed that Thomas had legally satisfied the sentence he received for attempted robbery and that the subsequent vaction of that sentence and his continued confinement under the felony murder conviction violated the Double Jeopardy Clause, but could not agree on the remedy necessary to correct

the double jeopardy violation...Additionally, Judge Bowman did not believe that a double jeopardy violation had occurred...Nevertheless, he joined with Judge Hanson in holding that any double jeopardy violation which had occurred could be corrected either by resentencing or retrial..." (A5,6). "They relied on the Supreme Court's decision in Morris v. Mathews, 475 U.S. 237, 106 S.Ct. 1032, 89 L.Ed.2d 187 (1986), which held that reducing a defendant's concededly jeopardy-barred conviction for aggravated murdeer to a conviction for murder that was not jeopardy barred was an adequate remedy for the double jeopardy violation..." "Judge McMillian, in a separate concurring and dissenting opinion held the double jeopardy violation could not be cured either by resentencing or retrying Thomas on the lesser included offense...thus Thomas should be granted habeas corpus relief..." (A6).

Both parties then petitioned for an en banc hearing and the petitions were granted. Five judges agreed the writ of habeas corpus should issue and four dissented. (A6)(Thomas v.Morris,844 F. 2d 1377.

One should note that the Missouri Supreme Court had held in State v. Morgan, 592 S.W.2d 796 (Mo.1980), in part at 803, the following:

> [1,2] It is therefore clear...the felony relied on to prove intent in a felony-murder case is a lesser-included offense of the murder. Here stealing was a lesser-included offense of second degree murder..."
>
> The Missouri Supreme Court had recognized in such a case double punishment violates the Double Jeopardy Clause. Morgan, supra.

The 8th Circuit en banc majority pointed out that "The critical factor in the cases discussed above is that the defendant had legally satisfied one of the illegally imposed multiple sentences" (A12). And that: "In the cases relied on by the State (here the Petitioner), the defendant had not legally satisfied one of the sentences.

The cases relied on by the en banc majority were those cited

by Thomas, namely, In re Bradley, 318 U.S. 50, 63 St.Ct. 470, 87 L.Ed. 608 (1943), In parte Lange, 85 U.S. (18 Wall.) 163, 21 L.Ed. 872 (1873); United States v. Edick, 603 F.2d 772 (9th Cir. 1979); Holbrook v. United States, 136 F.2d 649 (8th Cir. 1943). It also relied on United States v. Holmes, 822 F.2d 481 (5th Cir.1987). (A8-A12).

The Court pointed out (A12):

> The critical factor in the cases discussed is that the defendant had legally satisfied one of the illegally imposed multiple sentences. In the cases relied on by the State (Petitioner Jimmy Jones), the defendant had not legally satisfied one of the sentences.

The Court also distinguished Morris v. Mathews, supra, on the same ground, namely (A13):

> "The critical difference between Mathews and the present case is that the defendant in Mathews had not satisfied either the sentence for aggravated robbery or the sentence for felony murder. In the present case, Thomas had fully satisfied the sentence for attempted robbery. The same important distinction runs through the cases of Lange, Bradley, Edict, Holmes, and Holbrook, a distinction which we find determinative here.

Therefore, the U. S. Court of Appeals reversed the judgment of the district court and remanded the case to the district court "with instructions to issue the writ of habeas corpus..." (A14).

The minority opinion felt the majority had adopted a "sporting game approach to double jeopardy" (A19). (But the minority made no comment on the above cases cited by the majority where it might have applied the same approach).

SUMMARY OF THE ARGUMENT

When Respondent Larry P. Thomas was sentenced by the Missouri trial court to life imprisonment for felony murder and to fifteen years for the underlying felony of attempted robbery, the lesser included offense, it violated the Double Jeopardy Clause of the Fifth Amendment of the United States Constitution which is Applicable to the states through the due process clause of the Fourteenth Amendment. (Missouri's Legislature did not intend double punishment in such case, and the Missouri Supreme Court had so held.)

Under the terms of the judgment the fifteen year sentence was to be served FIRST. After Thomas had spent almost eight years serving the sentence, the Governor of Missouri commuted the sentence. Thus, Thomas had fully served the commuted sentence.

Since, a prisoner who serves a commuted sentence is in the same legal position he would have had had the trial court originally sentenced the prisoner to imprisonment for the same time as the commuted sentence, Thomas had fully served a legitimate sentence and one of the alternative penalties that might have lawfully been imposed on him. The Missouri Courts have never specifically held Thomas' fully served sentence was not a fully served legitimate sentence. Hence, there is no precedent to the contrary, and none which mentions Thomas.

Thus, when Thomas fully served a legitimate alternative penalty of the law he satisfied the judgment, and the power of the Courts to further punish him is gone, and further punishment would violate the double jeopardy clause. Accordingly, the United States Court of Appeals was correct in ordering the district court to issue a writ of habeas corpus since the Missouri courts had set aside Thomas' fully served commuted sentence after he had served it, and left him with the sentence of life imprisonment and had thereby violated the double jeopardy clause. To such effect are the cases of the United States Supreme Court. To take away the fully served sentence violates the Ex Post Facto Clauses as well as Double Jeopardy.

ARGUMENT

The statement of Petitioner in the first paragraph of his argument (Petition,7) that "Respondent was convicted for one crime (felony murder) and was sentenced to one punishment (life imprisonment)", is to say the least, totally misleading.

A copy of the judgment (omitted from Petitioner's appendix) is found at page 23 of this brief. It states the sentences as 15-years for attempted robbery, and life imprisonment for felony murder, and'the life sentence is to commence at the expiration of the 15-year sentence.

On June 12, 1981, the Governor of Missouri commuted the 15-year sentence "to a term ending June 16, 1981". (A89). Thus, on June 16,1981, the commuted 15-year sentence had been fully served.

It was after the commuted sentence had been fully served that the Missouri state judge at the trial level in a post-conviction proceeding set aside the fully served commuted 15-year sentence, and left Respondent Thomas with a life sentence. (A82). Thus, the state court set at naught the commutation by the Governor and deprived Thomas of the benefit of his fully served commuted sentence, as if pretending it had all never happened. This alone seems fundamentally unfair, and hence the sentence may be properly challenged in a federal habeas corpus proceeding. Neimann v. Parrat, 596 F.2d 316,317 (8th Cir. 1979).

However, on appeal of the denial of further relief in the post-conviction proceeding, the Missouri Court of Appeals recognized that the state judge's action in vacating the attempted robbery conviction was the judge's attempt to act "inaccordance with the principles set forth in State v. Morgan, 612 s.W.2d 1 (Mo. banc 1981), viz., that the legislature did not intend to allow separate and cumulative punishments for felony-murder and the underlying felony which produced the homicide ". (A70). The just mentioned State v. Morgan case was a double jeopardy case that was being redecided because the Supreme Court of the United

States had remanded to the Missouri Supreme Court and directed it to reconsider the appeal in the light of Whalen v. United States, 445 U. S. 684, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980). In Whalen, the Court held punishing the homicide and the underlying felony violated the double jeopardy clause unless the legislative body had made it clear there were to be two punishments. Having recognized these things, it is clear the Missouri Court of Appeals in the appeal of the 27.26 post-conviction motion recognized Thomas was raising a point of federal constitutional law involving the Double Jeopardy Clause of the Fifth Amendment of the United States Constitution.

Although, Petitioner's argument is certainly unclear and appears to muddy the waters with all kinds of problems not involved in the case, it also seems to maintain that no question of federal constitutional law is really involved and that what the majority of the 8th Circuit Court did in Thomas' case was to reverse a state court on a question of state law. If such is Petitioner's position, it is obviously wrong for even the Missouri Court of Appeals realized the Double Jeopardy Clause of the Fifth Amendment of the United States Constitution is involved, all as shown above. Therefore, the Court should deny the Petition for Certiorari because no such question of state law as mentioned in Petitioner's argument or as mentioned in Petitioner's statement of the "Question Presented" was used to overturn a state remedy.

However, upon reading further in Petitioner's argument, it appears that perhaps what the Petitioner is complaining about is found on page 10 of its Petition which states "...the en banc majority opinion declared that the state circuit court had no power to vacate the attempted robbery sentence because Governor Christopher Bond had previously commuted the sentence for attempted robbery conviction. Of course, the federal court was bound to follow state law on purely questions of state law.

The U.S. Magistrate had found "The fifteen-year sentence that" Thomas "was serving on the attempted robbery conviction was

completed on June 16, 1981". (A60). The Magistrate recommended the writ issue, but the district court rejected the recommendation (A64,A54). When the 8th Circuit's panel of three judges considered the case Hanson, J. wrote in his opinion (A29):

> "The only possible theory under which Thomas could be held not to have fulfilled the sentence for attempted robbery is to argue that fulfillment of a commuted sentence is not equal to the fulfillment of a non-commuted sentence. There is, however, no authority for such a proposition. Instead, under Missouri law, "the commuted sentence has the same effect and the status of a prisoner is the same as though the sentence had originally been for the commuted term." State v. Cerny, 248 S.W.2d 844,845 (Mo.1952); Ex parte Reno, 66 Mo.266,269 (1877).
>
> "...we hold that Thomas had legally satisfied the sentence he received for attempted robbery..."

When the majority en banc 8th Circuit opinion was issued it stated in part (A5) that two members (of the three-judge panel) had agreed Thomas had legally satisfied the sentence for attempted robbery. The en banc majority then went on to hold Thomas had satisfied the 15-year sentence when he served the commuted sentence (A8). The court cited State v. Cerny, supra.

Indeed, such a holding appears to be the universal law in the states of the United States for it is stated in 67A C.J.S. 46, Pardon & Parole, §35 that:

> "...After commutation, the sentence has the same legal effect, and the status of the prisoner is the same as though the sentence had originally been for the commuted term."

Thus, there can be no doubt that Thomas' legal status is the same as if he had been sentenced to the length of term of the commuted sentence, and that his service has satisfied the judgment.

Petitioner makes the Mikado-like argument that there could be no legal satisfaction of a sentence when the state's post-conviction court vacated that judgment and sentence in 1982" (Petition,14). Thus, according to this argument if the sentence and judgment were satisfied, then if it were set aside, the satisfaction never happened. Such an argument is simply nonsense,

and should be disregarded. It is a non sequitur. A defendant in a criminal case is surely entitled to whatever benefit a fully served commuted sentence confers on him. Had the defendant, Thomas, been charged only with the crime of attempted robbery, been convicted and sentenced, served over seven years of his sentence, and then had the sentence commuted by the governor, would any court hold the sentence could be vacated and he could be retried for the crime? Obviously, no. Such would violate the Double Jeopardy Clause. Citation of authority is hardly necessary, as the Double Jeopardy Clause protects against multiple punishments for the same offense. (See North Carolina v. Pearce, 395 U.S. 711,717, 89 S.Ct. 2072,2076, 23 L.Ed.2d 656 (1969). To use the Petitioner's language, any other holding would be "whimsical". To set such a fully served commuted sentence aside would violate due process. The Court should deny the issuance of a writ of certiorari.

Further, just as obviously, if after the state judge had passed the 15-year sentence, he decided eight years later that his original intention had been to sentence Thomas to 20 years, could he then vacate the fully served commuted sentence and impose twenty years. Obviously, not. Such a double punishment is forbidden by the Double Jeopardy Clause. Pearce, supra. Yet no doubt the State of Missouri's unyielding Attorney General would be arguing to not allow such a procedure is the "sporting-game" approach", and that "a wrong move by the judge" should not mean "immunity for the prisoner". These name calling arguments should not be applied to the instant case. The Supreme Court of the United States drew the line 105 years ago in Ex parte Lange, 85 U.S. (18 Wall.) 163, 21 L.Ed. 872 (1873). It has kept to that line ever since, and there is no need to disrupt 105 years of Double Jeopardy Law just because the Attorney General of Missouri doesn't like the result in the instant case. Such a reason is the way bad law comes into the books. Thus, the Court should refuse

to grant the Petitioner's Petition for Certiorari.

There is Thomas' position in the case which is simple, logical, and the undersigned attorney sincerely believes, open and shut. Further, it may bolstered by further reasons the 8th Circuit majority did not discuss. Therefore, the following is set forth.

Respondent Thomas was convicted of felony murder and its underlying felony of attempted robbery, and received sentences of life imprisonment for the murder, and fifteen years for the attempted robbery. The 15-year sentence was to be served FIRST, an extremely crucial fact.

Since, the attempted robbery was the lesser included offense of the felony murder, Thomas, legally, had committed only one crime, and only one sentence could be imposed (Pearce, supra), unless the Missouri Legislature had ordained that punishments should be imposed for both the felony murder and its underlying felony. Whalen v. United States, 445 U.S. 684, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980). But the Missouri Legislature had not decreed such punishment. The Missouri Supreme Court so held in State v. Morgan, 612 S.W.2d 1 (Mo.banc 1981). Therefore, imposing the two sentences violated the Double Jeopardy Clause of the Fifth Amendment of the United States Constitution. Whalen, supra. The Fifth Amendment is applicable to the states. Benton v. Maryland, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969).

So the next question is did complete serving of the commuted 15-year sentence satisfy the judgment? The answer is yes, according to principles set forth in both cases of the United States Supreme Court and the U. S. Courts of Appeals.

Starting 105 years ago, with Ex parte Lang, supra, it appears the prisoner was convicted of stealing mail bags. The punishment set by Congress was a fine or imprisonment. (Not a fine and imprisonment.). The federal judge fined the prisoner. The prisoner's lawyer paid the fine. The same day the judge set aside the fine and sentenced the defendant to prison. This Court

held
/once "the prisoner had fully performed, completed, and endured one of the alternative punishments which the law prescribed for the offense" the authority of the court "to punish for that offense was at an end...The power was exhausted; its further exercise was prohibited. It was error...". Id. at 176.

The Court felt double punishment was the real danger guarded against by the Constitution. The prisoner had satisfied the judgment and the Court's power was at an end. Similarly, in Respondent Thomas' case. He has served a legitimate alternative penalty and the Court's power to punish him further is gone. It should be noticed he had done so before the state judge ever set the fully served commuted sentence aside.

The Court again followed Lange fifty-six years later in United States v. Benz, 282 U.S. 304 (1930).

And thirteen years later in 1943, it again followed Lange and Benz in In re Bradley, 318 U.S. 50, 63 S.Ct. 470, 87 L.Ed. 608 (1943). Benz, supra, had held at 282 U.S. 310:

> "...the majority opinion (in Lange)...holds that a new sentence of imprisonment alone cannot be imposed after payment of the fine, which operated as a satisfaction of the prior judgment.

Thus, similarly, Thomas had satisfied the judgment. And the trial court's power to punish further was gone.

In re Bradley, 318 U.S. 50 (1943) was a case where the prisoner had intimidated a witness in a corridor next to the court where there was a trial. He was held guilty of contempt and sentenced to pay a $500 fine and to be imprisoned for six months. Under the statute he could have received either of these sentences but not both. The prisoner paid the fine. Then the judge realized his mistake and amended the sentence omitting the fine. The prisoner petitioned for certiorari and the Supreme Court held:

> "When...the fine was paid...the petitioner had complied with a portion of the sentence which could lawfully have been imposed. As

judgment of the court was thus executed so as to be a full satisfaction of one of the alternative penalties of the law the power of the court was at an end..."

"It follows that the subsequent amendment of the sentence could not avoid the satisfaction of the judgment and the attempt to accomplish that end was a nullity...the petitioner is entitled to be freed..1" (emphasis supplied.)

In 1979, in United States v. Edick, 603 F.2d 772 (9th Cir. 1979), the district court had imposed two consecutive 10-year sentences where only one was authorized by Congress. Edict had fully satisfied one of the sentences because the Court had reduced its length. Citing Lange, Bradley, and Benz, supra, the court concluded at 603 F.2d 778:

"[7,8] We conclude that the district court had lost the power to resentence Edick on Count II once he had satisfied his sentence on Count I. We remand to the district court to vacate the three-year sentence on Count II imposed upon revocation of Edick's probation."

In Holbrook v. United States, 136 F.2d 649 (8th Cir.1943), the defendant had not satisfied either of the sentences he received. Yet, imposing two sentences on him violated the double jeopardy clause. The question was whether the trial court had a right to determine which sentence should prevail and which should be set aside. Since, the defendant had not satisfied either sentence, the 8th Circuit held (at 136 F.2d 653[3]):

"That question may properly be determined by the trial court up to the time that there has been a legal satisfaction of one of the sentences..."

The court then distinguished Holbrook's case from Ex parte Lange and from In re Bradley, supra, pointing out at 136 F.2d 652:

"It was accordingly held in both those cases (Lange and Bradley) that, since there had been thus a legal satisfaction of one valid alternative provision of the original sentence, any attempt to compel the defendant to serve the imprisonment portion of the sentence would be subjecting him to double punishment"

Thus, the fundamental unfairness of the Petition for

certiorari filed by the Missouri Attorney General on behalf of the Petitioner, Superintendant Jones, appears If this Honorable Court reverses the 8th Circuit, it means it approves depriving Respondent Thomas of the legal effect of his fully served commuted sentence which fully satisfied the judgment according to 114 years of federal double jeopardy law followed by both this Honorable Court and the courts of appeals, and throwing up in the air the subject of double jeopardy law because of the result in a very few cases is disliked. And once it does that where will it draw the new line. Will it hold, for example, that once a sentence has been fully satisfied it can be set aside twenty years later because the judge has now decided he made a mistake and should have given the prisoner a longer sentence? Indeed, such a holding would be a bald excercise of power to decree ex post facto law, a power which this Court has denied to Courts. See Bouie v. City of Columbia, 378 U.S. 347, 84 S.Ct. 1697, 12 L.Ed.2d 894 (1964) in which it was held courts may not issue judgments which have an ex post facto effect for such violates the two provisions of the United States Constituition which forbid ex post facto laws. (See, for example, Art.1.§10.U.S. Constitution.)

While neither the opinions that resulted from the 8th Circuit in banc hearing, nor the opinions that resulted from the three judge panel 8th Circuit hearing (A2-A50) discuss the ex post facto effect of taking away from the Thomas the benefit of his fully served commuted sentence and setting at naught the commuting act of Missouri's governor, there was a discussion to some extent of these things in Thomas' initial brief filed in the 8th Circuit appeal.

The undersigned attorney believes it legitimate to enter on some discussion of not rendering an opinion which violates the ex post facto provisions of the Constitution as a measure that reinforces and bolsters the argument that the Court should not render an opinion that violates the law of Double Jeopardy. Therefore, the following is stated.

Ex post facto

The founding fathers regarded acts having an ex post facto effect as a great evil, so much so, that they twice prohibited ex post facto laws in the Constitution. See Article 1, §9,cl.3 and Article I, §10, cl.1.

The prohibition also confines the judiciary. Weaver v. Graham, 450 U.S. 24, footnote 10 at 450 U.S.29. When a judicial decision achieves what an ex post facto law may not, it violates due process. Bouie v. City of Columbia, supra. As this Court said in Bouie at 378 U.S. 354:

> "...If a state legislature is barred by the Ex Post Facto Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same effect by judicial construction..."

In Wolff v. McDonald, 418 U.S. 539, Nebraska prisoners had been given the right to earn certain "time-off" credits which could only be taken away by serious misconduct, and some prisoners had already earned such time off. The state then took them away by new rules. This Court held at 418 U.S. 557 that:

> "...But the State having created the right to good time and itself recognizing that its deprivation is a sanction authorized for major misconduct, the prisoner's interest has real substance and is sufficiently embraced with in the Fourteenth Amendment "liberty" to entitle him to those minimum procedures appropriate under the circumstances and required by the Due Process Clause to insure that the State created right is not arbitrarily abrogated." (emphasis supplied)

If "good time" is protected by the due process and ex post facto clauses, how much more is a fully served commuted sentence? When the Missouri judiciary took away Thomas' fully served commuted sentence, it did what the Missouri Legislature surely could not have done because it had an ex post facto effect.

According to Weaver v. Graham, 450 U.S. 24,29, 101 S.Ct. 960, 964 (1981), U. S. Supreme Court decisions prescribe "two critical elements for a criminal or penal law to be ex post facto. The court said:

> "...it must be retrospective, that is, it must apply to events occuring before its enactment, and it must disadvantage the offender affected by it...a law need not impair a "vested right" to violate the ex post facto prohibition...The presence or absence of an affirmative enforceable right is not relevant, however, to the ex post facto prohibition ...Critical to relief under the Ex Post Facto Clause is not an individual's right to less punishment, but the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consumated..." (emphasis supplied.)

Here the Missouri Courts have reached back in time (with "retrospective effect") to an "event occurring before" their decision to take away Thomas' "vested" commuted sentence, and deprived Thomas of the benefit of that vested commuted sentence which most certainly "disadvantages the offender" (Thomas). Thus, the Missouri Courts deprived Thomas of far more than "good time" as in Weaver, supra. They deprived him a fully completed sentence.

The Missouri Court of Appeals, in Thomas v. State, 665 S.W.2d 621 at 625, made the Mikado-like statement:

> "...the procedure followed by the trial court prejudice movant. His entire time of incarceration is credited on the life sentence..."

This Mikado like statement reminds one of the comment of this Court in footnote 17 in North Carolina v. Pearce, 395 U.S.711 at 721 which reads:

> "17 Cf. King v. United States, 69 App.D.C.10, 12-13,293-294: "The Government's brief suggests in the vein of the Mikado, that because the first sentence was void appellant 'has served no sentence but has merely spent time in the penitentiary;' that since he should not have been imprisoned as he was, he was not imprisoned at all".

Somewhat similarly here, since Thomas should never have received two sentences we will take away his fully served sentence which entitles him to go free under the law of Double Jeopardy, and credit his time to a life sentence which does not prejudice him. Thus, by the most clear reason there is not the slightest difference between being free and serving a life sentence.

By such silly reasoning do courts incur the guffaws and disrespect of the people. And this Court above all courts should

not
/act in such a manner.

And incidentally, it would be a shame to delay the rehabilitation of Thomas. If the Court were to send for the record, it would find that Thomas has explained that he and his sister were orphaned at an early age. The sister went on to become a school teacher but Thomas became (his language) a "street boy". While in prison, he realized there might still be time to make something of his life. Accordingly, he completed his high school equivalency, and then completed two years of college with grades of mostly A and B. He has applied for admittance to Columbia College at Columbia, Missouri. His sister is sponsoring him. The undersigned attorney has now been informed Thomas will be admitted in the next semester. While it all does not excuse his crime, it should be realized that this crime was committed when Thomas was 19 years old and it is not a case of simply an attempt to kill a witness. So far, Thomas deemonstrates he deserves another chance in life.

In any event,for all the foregoing legal reasons, the Court should refused to grant a writ of certiorari.

CONCLUSION

It is fundamentally contrary to the law of Double Jeopardy under the Fifth Amendment of the Constitution as applied to the states as a matter of due process through the Fourteenth Amendment when one has illegally received two sentences in violation of the Double Jeopardy Clause, to take away a fully served sentence, and leave the prisoner to serve the remaining sentence. Further, to do such a thing has an ex post facto effect, and is also fundamentally unjust, and therefore a violation of due process. To sanction such procedure this Court will have to ignore the double jeopardy law of the last 114 years, make such new double jeopardy law inexplicable, and engage in some absurd reasoning.

For all the foregoing reasons, the writ of certiorari should be denied. There is no new question presented, and no conflict in

the circuit courts of appeals cases. Therefore, there is no good reason to grant certiorari. Rule 17, Supreme Court Rules.

RESPECTFULLY SUBMITTED,

SPRINGFIELD BALDWIN,
Attorney appointed by the United States Court of Appeals to act as attorney for Larry P. Thomas under the Criminal Justice Act.
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CERTIFICATION OF SERVICE

I hereby certify that I, the undersigned appointed attorney, have served three copies of this brief upon Petitioner Jimmy Jones' attorneys of record in this case number 88-420, said attorneys of record being William L. Webster, Attorney General of Missouri, and his two Assistant Attorney Generals, John M. Morris III and Stephen D. Hawke, by placing said three copies in an envelope address to the three said attorneys at their address of record of P. O. Box 899, Jefferson City, Missouri 65102, and mailing the said envelope and three copies to them by first class pre-paid U. S. Mail on this 23 day of Dec., 1988.

SPRINGFIELD BALDWIN
8th Circuit Court-appointed attorney
for Respondent Larry P. Thomas
(and also a member of the bar of the
Supreme Court of the United States)

IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS

STATE OF MISSOURI, City of St. Louis. } ss.

BE IT REMEMBERED, That on this the 25th day of May, 19 73 at the regular April Term of the Circuit Court of the City of St. Louis, Division No. 19 thereof, begun and held at the Court House in the City of St. Louis and State aforesaid, before the Honorable Harry M. Jamet, Judge of the Twenty-second Judicial Circuit of the State of Missouri and Judge of this Court, the following, among other proceedings, were had, to-wit:

THE STATE OF MISSOURI, *Plaintiff.*
vs.
LARRY THOMAS, *Defendant.*

No. 72-2632

Criminal Action, Sentence and Judgment.

Now, at this day comes the Assistant Circuit Attorney for the State, and also comes the defendant herein, in person, in the custody of the Sheriff of this City, and in the presence of Kevin O'Keefe, Public Defender, Attorney and Counsel in open Court, whereupon said defendant is informed by the Court that he has heretofore been found guilty of the crime of Count 1-Attempted Robbery First Degree By Means of a Dangerous and Deadly Weapon; Count 2- Murder First Degree and being now asked by the Court if he had any legal cause to show why judgment should not be pronounced against him according to law, and still failing to show such cause, it is therefore sentenced, ordered and adjudged by the Court, that the said defendant:

LARRY THOMAS

having been found guilty as aforesaid, under an indictment, ~~XXXXXXX~~ against him, be committed to State Department of Corrections of the State of Missouri for the period of Fifteen(15)years on Count 1 and Life Imprisonment on Count 2. It is further ordered by the Court that Sentence imposed in Count 2 commence at the expiration of sentence imposed in Count 1.

and that the Sheriff of this City shall, without delay, remove and safely convey the said defendant to the said State Department of Corrections, there to be kept, confined and treated in the manner directed by law, and the Director of State Department of Corrections is required to receive and safely keep him the said defendant, in the State Department of Corrections aforesaid, until the judgment and sentence of the Court herein be complied with, or until the said defendant shall be otherwise discharged by due course of law.

It is further considered, ordered and adjudged by the Court, that the State have and recover of said defendant the costs in this suit expended, and that hereof execution issue therefor.

STATE OF MISSOURI, City of St. Louis. } ss.

I, George M. Solomon, Clerk of the Circuit Court for Criminal Causes, in and for said City, hereby certify the foregoing to be a full, true and complete copy of the original judgment and sentence of the Court in the cause therein named, as the same appears of record in my office.

WITNESS my hand as Clerk, and the seal of said Court.

Done at office in the City of St. Louis, this 29th day of May, A. D. 19 73

George M. Solomon
Clerk, Circuit Court of the City of St. Louis, for Criminal Causes.

JOINT

APPENDIX

Supreme Court, U.S.
FILED
FEB 23 1989

No. 88-420

In the Supreme Court of the United States

OCTOBER TERM, 1988

JIMMY JONES, Superintendent, Missouri Training Center for Men at Moberly,
Petitioner,

vs.

LARRY P. THOMAS,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JOINT APPENDIX

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Petition for Certiorari Filed September 7, 1988
Certiorari Granted January 9, 1989

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No. 84-1760 C(5)

1984	
8/1/84	PETITION FOR Writ of Habeas Corpus, fld.; APPLICATION to Proceed in forma pauperis, fld.; MEMORANDUM IN LAW IN SUPPORT OF HABEAS CORPUS, fld.; ORDER/RECOMMENDATION - (WSB) - concerning in forma pauperis status: Petitioner, having shown an inability to pay the filing fee for the commencement of this action, IT IS HEREBY ORDERED that the Clerk receive and file the complaint in this action without the payment of the required filing fee. CAUSE SUBMITTED TO JUDGE LIMBAUGH FOR CONSIDERATION.
8/9/84	ORDER, fld (SNL). Respondent show cause in writing within 30 days why the relief requested should not be granted. cc attys.
8/14/84	RETURN OF SERVICE, by certified mail, John Ashcroft, Atty. Gen.
9/7/84	RESPONSE to order to show cause w/exhibits A-H, fld. by respondent.
9/7/84	Pursuant to order of 8/9/84, Petition fld. 8/1/84 and response fld. 9/7/84 and entire file submitted to Judge Limbaugh.
12/14/84	ORDER (SNL) fld. ORDERED this case is referred to U.S. Mag. Kingsland for report and recommendation. cc: pltff and atty.

1985

3/29/85 REVIEW AND RECOMMENDATION (RDK) - Parties have 10 days to file objections, fld. CC: Parties
Docket sheet and file returned to unit.

4/12/85 Review and Recommendation and entire file submitted to Judge Limbaugh

6/28/85 ORDER (SNL) fld. ORDERED the report and recommendation of Mag. Kingsland is rejected. FURTHER ORDERED that Larry P. Thomas' petition for issuance of writ of habeas corpus is denied. cc: attys.

7/11/85 NOTICE of appeal, fld. by pltff. (letter sent to pltff concerning filing Certificate of Probable Cause-notice of appeal not submitted to USCA)

7/24/85 CERTIFICATE OF PROBABLE CAUSE, fld. by pltff. Del. to Judge Limbaugh.

7/29/85 ENDORSEMENT-on certificate of probable cause-PETITIONER granted leave to appeal in forma pauperis (SNL)

7/31/85 DELIVERED USCA-2 certified copies of notice of appeal, 2 certified copies of certificate of probable cause, 2 certified copies of docket entries, 2 copies of order of 6/28/85. cc: pltff and atty w/copy of docket entries. Judge Limbaugh and Court report given copies of notice of appeal.

United States Court of Appeals for the Eighth Circuit, No. 85-1934

1985

Aug. 1 DOCKETED appeal.

" " CERTIFIED copies of notice of appeal, docket entries and judgment dated June 28, 1985. (1)db

" " ORDER: Mr. Springfield Baldwin of St. Louis, Mo. is hereby appointed to represent appellant herein udner (sic) terms of CJA. (2)db

Aug 1 BRIEFING SCHEDULE Appellant DR 8/12/85; Appellee D.R. 8/21/85; Clerk's Record 9/3/85; Appendix 9/10/85; Transcript 9/3/85; Applnt. Brief 9/10/85; Apple. Brief 10/10/85; Reply brief 10/24/85.

Aug. 5 APPEARANCE for appellant. (3)cm

Aug. 26 MOTION to supplement the record. (4)cm

Aug. 28 ORDER: Aplnts motion to supplement the record is conditionally granted, subject to further consideration by the panel ultimately assigned this appeal for determination. (5)cm

Sept. 9 APPEARANCE for appellee. (6)cm

Sept 10 MOTION BY APLNT for ext. of time to file brief - GRANTED TO & INCL. 9/30/85 on 9/11/85 (7)de

Sept. 26 BRIEF OF APPELLANT: w ser 9/26 5 copies & ADDENDUM: (8)sjo

Oct. 11 MOTION BY APLEE for ext. of time to file brief - GRANTED TO & INCL. 10/28/85 on 10/15/85 GRANTED IN PART (9)de

Oct. 24 MOTION BY APLEE for ext. of time to file brief - GRANTED TO & INCL. IN PART 11/8/85 on 10/31/85 (10)de

Nov. 11 BRIEF OF APPELLEE: w/ser 11/8 / 7 copies (11)sjo

Nov. 20 TO SCREENING (MG)

Nov. 18 MOTION of appellant to supplement the record (12)cm

Nov. 22 ORDER: Aplnts motion to supplement the record with Exhbiits (sic) No. 1, Commutation of Sentence and Exhibits No. 2, E.L. Kimbrough's letter of 11/15/85 is granted. (13)cm

Nov. 25 REPLY BRIEF OF APPELLANT: w/ser 11/25 / 5 copies (14)sjo

1986

Feb. 13 **SET FOR ARGUMENT in St. Paul during March session.

Mar 11 ARGUED & SUB to Judges McMillian, Bowman & Hanson. Springfield Baldwin for aplnt. Patricia Perkins for aplee. Conc. by Baldwin. Recorded.

[1987]

Apr. 3 OPINION BY HANSON, CONCUR & DISSENT BY MCMILLIAN PUBLISHED DISSENT BY BOWMAN (15)jp

Apr. 3 JUDGMENT: Judgment of the district court is reversed and remanded for further proceedings consistent with the opinion of this Court. (16)jp

Apr. 17 PETITION FOR REHEARING en banc filed by appellee. w/service. (17)rmh

Apr. 17 MOTION FOR REHEARING by the panel, and suggestion the Court en banc hear the case filed by appellant. w/service. (18)rmh

May 11 RESPONSE TO APPELLEE'S MOTION FOR REHEARING EN BANC FILED BY APPELLANT. w/service. (19)rmh

June 24 ORDER: The petition for rehearing en banc is hereby granted. Argument will be scheduled by further order of the court. Supplemental briefs can be filed, not to exceed 15 pages, and the order of briefing shall be structured by the clerk's office. (20)rmh

Aug. 11 SET FOR ARGUMENT EN BANC - September in St. Louis tr

Sep. 14 ARGUED AND SUBMITTED to the Court En Banc in St. Louis, Missouri: Judges Lay, Heaney, McMillian, Arnold, J.R. Gibson, Fagg, Bowman, Wollman, Magill. Counsel for aplnt Springfield Baldwin. Counsel for aplee Patricia D. Perkins. Rebuttal by Baldwin. RECORDED. tr

Sept 24 RECEIVED 28(j) from counsel for appellant. To Ct. tr

Sept 24 RECEIVED 28(j) from counsel for appellee. To Ct. tr

1988

Apr 21 OPINION BY MCMILLIAN. PUBLISHED. DISSENT BY BOWMAN, JOINED BY JOHN R. GIBSON, FAGG, WOLLMAN. (21)mlm

Apr 21 JUDGMENT: Judgment of the district court is reversed and the cause is remanded to the

	district court with instructions to issue the writ in accordance with the opinion of this Court. (22)mlm
May 5	PETITION FOR REHEARING EN BANC filed by appellee. w/service. (23)rih
June 9	ORDER: Appellee's petition for rehearing has been considered by the Court and is denied. Petition for rehearing by the panel is also denied. (24)rmh
June 17	MANDATE ISSUED pep
June 21	RECEIPT FOR MANDATE (25)pep
Jul. 11	COMPENSATION VOUCHER of appointed counsel (Baldwin) CJA (26)ddr
July 19	APPEARANCE FOR APPELLEE. w/service. (27)rmh
July 19	MOTION to recall the mandate filed by appellee. w/service. (28)rmh
July 19	APPEARANCE for appellee. w/service. (29) rmh
July 21	APPELLANT'S RESPONSE to motion to recall the mandate. (30)rmh
July 25	APPELLANT'S MEMORANDUM in support of response to appellee's motion to recall the mandate. w/service (31)eh
Aug. 11	ORDER: Appellee's motion to recall the mandate has been considered by the Court and is hereby denied. (32)rmh
Sept. 20	NOTICE OF FILING of pet. for writ of cert. to the Sup. Ct. of the U.S. as case no. 88-420 dated 9-7-88 (33)pep

Oct. 28	SUPPLEMENTAL COMPENSATION VOUCHER of appointed counsel (Baldwin) CJA (34)
Dec. 22	SUPPLEMENTAL COMPENSATION VOUCHER #2 of appointed counsel (Baldwin) CJA --- Voucher sent to A.O. for payment. (35)ddr
1989	
Jan. 12	CERTIFIED COPY OF ORDER OF THE SUP CT. OF THE U.S. GRANTING pet. for writ of cert. in case no. 88-420, 1-9-89. (36)ea

JUDGMENT AND SENTENCE OF THE CIRCUIT COURT OF THE CITY OF ST. LOUIS, MAY 25, 1973

IN THE
CIRCUIT COURT OF THE CITY OF ST. LOUIS

STATE OF MISSOURI,)
) ss.
City of St. Louis.)

BE IT REMEMBERED, That on this the 25th day of May, 1973 at the regular April Term of the Circuit Court of the City of St. Louis, Division No. 19 thereof, begun and held at the Court House in the City of St. Louis and State aforesaid, before the Honorable Harry M. James, Judge of the Twenty-second Judicial Circuit of the State of Missouri and Judge of this Court, the following, among other proceedings, were had, to-wit:

THE STATE OF MISSOURI, *Plaintiff,*	)	Criminal Action,
No. 72-2632 *vs.*	)	Sentence and
LARRY THOMAS, *Defendant.*	)	Judgment.

Now, at this day comes the Assistant Circuit Attorney for the State, and also comes the defendant herein, in person, in the custody of the Sheriff of this City, and in the presence of Kevin O'Keefe, Public Defender, Attorney and Counsel in open Court, whereupon said defendant is informed by the Court that he has heretofore been found guilty of the crime of Count 1-Attempted Robbery First

Degree By Means of a Dangerous and Deadly Weapon, Count 2-Murder First Degree and being now asked by the Court if he had any legal cause to show why judgment should not be pronounced against him according to law, and still failing to show such cause, it is therefore sentenced, ordered and adjudged by the Court, that the said defendant:

LARRY THOMAS

having been found guilty as aforesaid, under an indictment, against him, be committed to State Department of Corrections of the State of Missouri for the period of Fifteen (15) years on Count 1 and Life Imprisonment on Count 2. It is further ordered by the Court that Sentence imposed in Count 2 commence at the expiration of sentence imposed in Count 1, and that the Sheriff of this City shall, without delay, remove and safely convey the said defendant to the said State Department of Corrections, there to be kept, confined and treated in the manner directed by law, and the Director of State Department of Corrections is required to receive and safely keep him the said defendant, in the State Department of Corrections aforesaid, until the judgment and sentence of the Court herein be complied with, or until the said defendant shall be otherwise discharged by due course of law.

It is further considered, ordered and adjudged by the Court, that the State have and recover of said defendant the costs in this suit expended, and that hereof execution issue therefor.

STATE OF MISSOURI,)
) ss.
City of St. Louis.)

I, George M. Solomon, Clerk of the Circuit Court for Criminal Causes, in and for said City, hereby certify the foregoing to be a full, true and complete copy of the original judgment and sentence of the Court in the cause therein named, as the same appears of record in my office.

WITNESS my hand as Clerk, and the seal of said Court.
Done at office in the City of St. Louis, this 29th day of May, A.D. 1973.

/s/ George M. Solomon
Clerk, Circuit Court of the City of St. Louis, for Criminal Causes.

OPINION OF THE MISSOURI COURT OF APPEALS, ST. LOUIS DISTRICT, FILED MAY 27, 1975 (AS CORRECTED)

This item has already been reproduced in the Appendix to the petition for writ of certiorari at A84.

JUNE 12, 1981, COMMUTATION OF SENTENCE BY GOVERNOR CHRISTOPHER S. BOND

This item has already been reproduced in the Appendix to the petition for writ of certiorari at A89.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER OF THE COURT BY THE CIRCUIT COURT OF THE CITY OF ST. LOUIS, FILED JUNE 24, 1982

This item has already been reproduced in the Appendix to the petition for writ of certiorari at A73.

OPINION OF THE MISSOURI COURT OF APPEALS, EASTERN DISTRICT, FILED SEPTEMBER 27, 1983

This item has already been reproduced in the Appendix to the petition for writ of certiorari at A65.

ORDER OF THE UNITED STATES DISTRICT COURT, FILED AUGUST 1, 1984

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI

84-1760-C-5

Larry P. Thomas

v.

Terry Morris

ORDER/RECOMMENDATION OF UNITED STATES MAGISTRATE CONCERNING IN FORMA PAUPERIS STATUS

[X] Petitioner, having shown an inability to pay the filing fee for the commencement of this action,

IT IS HEREBY ORDERED that the Clerk receive and file the complaint in this action without the payment of the required filing fee. 28 U.S.C. §1915(a).

/s/ William S. Bahn
United States Magistrate

Dated: 7/31/84

REVIEW AND RECOMMENDATION OF THE FEDERAL MAGISTRATE, FILED MARCH 29, 1985

This item has already been reproduced in the Appendix to the petition for writ of certiorari at A55.

ORDER OF UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI, EASTERN DIVISION, FILED JUNE 28, 1984

This item has already been reproduced in the Appendix to the petition for writ of certiorari at A51.

NOTICE OF APPEAL, DATED JULY 8, 1985, FILED JULY 11, 1985

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF MISSOURI,
EASTERN DIVISION

Cause No. 84-1760 (5)

LARRY THOMAS,
Petitioner,
-vs-
TERRY D. MORRIS,
Respondent.

NOTICE OF APPEAL

NOTICE is hereby given that the petitioner LARRY THOMAS, above-captioned cause, appeals to the United States Court of Appeals for the Eighth Circuit from the judgement entered on the 28th day of June, 1985, by the Honorable Stephen N. Limbaugh, Judge, "rejecting" the Review and Recommendation of the United States Magistrate entered on the 29th day of March, 1985, recommendating that petitioner's petition for "writ of habeas

corpus" be *granted*, whereupon the District Court in *rejecting* said recommendation, "denied" petitioner relief thereon.

Respectfully submitted,

/s/ Larry Thomas
Larry Thomas - petitioner
Register No. #21220
P.O. Box 7 - 1-A-55
Moberly, Missouri 65270
In *Propria personam*

DATED: this 8th day of July
1985.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT, THE PANEL OPINION, FILED APRIL 3, 1987

This item has already been reproduced in the Appendix to the petition for writ of certiorari at A24.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT, EN BANC, FILED APRIL 21, 1988

This item has already been reproduced in the Appendix to the petition for writ of certiorari at A2.

DENIAL OF PETITION FOR REHEARING EN BANC

This item has already been reproduced in the Appendix to the petition for writ of certiorari at A1.

ORDER OF THE UNITED STATES SUPREME COURT FILED JANUARY 9, 1989

SUPREME COURT OF THE UNITED STATES

No. 88-420

JIMMY JONES, Superintendent, Missouri Training Center for Men at Moberly,
Petitioner,

v.

LARRY P. THOMAS,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The motion of respondent for leave to proceed in forma pauperis is granted. The petition for a writ of certiorari is granted.

January 9, 1989.

PETITIONER'S

BRIEF

Supreme Court, U.S.
FILED
FEB 23 1989
JOSEPH F. SPANIOL, JR.
CLERK

5

No. 88-420

In the Supreme Court of the United States

OCTOBER TERM, 1988

JIMMY JONES, Superintendent, Missouri Training Center for Men at Moberly,

Petitioner,

vs.

LARRY P. THOMAS,

Respondent.

ON WRIT OF CERTIORARI TO ... JNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF PETITIONER

WILLIAM L. WEBSTER
Attorney General
JOHN M. MORRIS III
Counsel of Record
Assistant Attorney General
STEPHEN D. HAWKE
(Of Counsel)
Assistant Attorney General
Post Office Box 899
Jefferson City, Missouri 65102
(314) 751-3321
Attorneys for Petitioner

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

36 pp

QUESTION PRESENTED

WHETHER THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT COULD OVERTURN A STATE-COURT GRANTED REMEDY FOR A DOUBLE JEOPARDY VIOLATION AS BEING CONTRARY TO THAT FEDERAL COURT'S UNDERSTANDING OF STATE LAW.

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OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Eighth Circuit, *en banc*, granting a writ of habeas corpus by a five to four vote, is reported at 844 F.2d 1337 (8th Cir. 1988) (*en banc*) (Petition for Writ of Certiorari Appendix—hereinafter "P.C.App."—at A2). The panel Opinion of the United States Court of Appeals for the Eighth Circuit granting a conditional writ of habeas corpus is reported at 816 F.2d 364 (8th Cir. 1987) (P.C.App. A24). The Opinion of the United States District Court for the Eastern District of Missouri denying the petition for a writ of habeas corpus is unpublished, but is included in the appendix of the petition for a writ of certiorari (P.C.App. A51). The Magistrate's Review and Recommendation is also unpublished, but is included in the appendix of the petition for a writ of certiorari (P.C.App. A55).

JURISDICTION

The Court has jurisdiction to consider this case pursuant to 28 U.S.C. §1254(1). The Opinion of the United States Court of Appeals was entered on April 21, 1988 (P.C.App. A2). The United States Court of Appeals denied a timely petition for rehearing on June 9, 1988 (P.C.App. A1). The Petition for a Writ of Certiorari was filed on September 7, 1988, and this Court granted the Petition for a Writ of Certiorari on January 9, 1988 (Joint Appendix—hereinafter "J.App."—at 17).

APPLICABLE CONSTITUTIONAL AND STATUTORY PROVISIONS

1. The Fifth Amendment to the United States Constitution:

> No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation.

2. Section 1 of the Fourteenth Amendment to the United States Constitution:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

3. Missouri Supreme Court Rule 27.26 (repealed January 1, 1988) provides, in pertinent part:

> A prisoner in custody under sentence and claiming a right to be released on the ground that such

> sentence was imposed in violation of the Constitution and laws of this state or the United States, or that the court imposing such sentence was without jurisdiction to do so, or that such sentence was in excess of the maximum sentence authorized by law or is otherwise subject to collateral attack, may file a motion at any time in the court which imposed such sentence to vacate, set aside, or correct the same.

4. Section 556.150, RSMo 1969 (repealed January 1, 1979) provides, in relevant part:

> Every person who shall attempt to commit an offense prohibited by law, and in such attempt shall do any act toward the commission of such offense, but shall fail in the perpetration thereof, or shall be prevented or intercepted in executing the same, upon conviction thereof, shall, in cases where no provision is made by law for the punishment of such attempt, be punished as follows:
>
> (1) If the offense attempted to be committed be such as is punishable by the death of the offender, the person convicted of such attempt shall be punished by imprisonment in the penitentiary for a term not less than two nor exceeding fifteen years.
>
> . . .

5. Section 559.010, RSMo 1969 (repealed September 28, 1975) provides:

> Every murder which shall be committed by means of poison, or by lying in wait, or by any other kind of willful, deliberate and premeditated killings, and every homicide which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or mayhem shall be deemed murder in the first degree.

6. Section 560.120, RSMo 1969 (repealed January 1, 1979) provides:

> Every person who shall be convicted of feloniously taking the property of another from his person, or in his presence, and against his will, by violence to his person, or by putting him in fear of some immediate injury to his person; or who shall be convicted of feloniously taking the property of another from the person of his wife, servant, clerk or agent, in charge thereof, and against the will of such wife, servant, clerk or agent by violence to the person of such wife, servant, clerk or agent, or by putting him or her in fear of some immediate injury to his or her person, shall be adjudged guilty of robbery in the first degree.

STATEMENT OF THE CASE

At approximately 6:15 p.m. on November 8, 1972, Mentoe Vernell went to the Reid Auto Parts Store located at 4750 Martin Luther King Drive, St. Louis, Missouri, to pay his bill. The general manager, a clerk and Vernell, a regular customer, were the only persons in the store. A short time later, Respondent Larry P. Thomas and a companion, later identified as Fancell Johnson (Tr. 225), entered the store (Tr. 65, 67). Johnson walked over to the general manager and inquired about auto parts. At this time, respondent announced a holdup (Tr. 113). Vernell reached out for respondent, who had a gun in his hand (Tr. 113, 139). Respondent fired four or five shots point-blank at Vernell (Tr. 114) before Vernell reached into his pants pocket, pulled out a gun and fired three shots (Tr. 114), striking respondent in the arm and the leg. Respondent and Vernell fell

wounded to the floor (Tr. 117). The police, who arrived at the scene almost immediately (Tr. 139), disarmed respondent (Tr. 119, 142). Vernell and respondent were taken to the hospital (Tr. 154, 228). Vernell died from the gunshot wounds while en route to the hospital (Tr. 228).

Respondent was charged with attempted robbery and first-degree murder (Tr. 1-2). Respondent went to trial on April 30, 1973 (Tr. 22). After the evidence and arguments of counsel, the jury was instructed on murder in the first-degree and attempted robbery (Tr. 252-256). The trial court did not instruct on any lesser offense of first-degree murder (Tr. 250-258). Upon the evidence, respondent was convicted of attempted first-degree robbery by means of a dangerous and deadly weapon, §§556.150, 560.120, RSMo 1969 (repealed January 1, 1979), and first-degree murder, §559.010, RSMo 1969 (repealed September 28, 1975) (Tr. 259), for which he was sentenced to fifteen years and life imprisonment, these sentences to run consecutively and in that order (Tr. 270). On direct appeal, the Missouri Court of Appeals affirmed the convictions. *State v. Thomas*, 522 S.W.2d 74 (Mo. App., St.L.D. 1975) (P.C.App. A84).[1]

On February 7, 1977, respondent initiated a post-conviction action pursuant to Missouri Supreme Court Rule 27.26 (repealed January 1, 1988) in the Circuit Court of the City of St. Louis. The Circuit Court denied the motion. Respondent appealed. On January 15, 1981, in an unpublished order, the Missouri Court of Appeals, Eastern District, summarily vacated the state trial court's

---

1. Respondent did not argue on direct appeal that his conviction for attempted robbery and first-degree murder violated the Double Jeopardy Clause. At that time, there was no doubt that there was no constitutional problem with the convictions. *See, State v. Overstreet*, 551 S.W.2d 621, 623 (Mo. banc 1977) (construing §559.010, RSMo 1969).

dismissal of the Rule 27.26 motion and remanded the case due to an inability to complete the transcript for appeal (P.C.App. A75).

On June 16, 1981, then Governor Christopher S. Bond commuted respondent's sentence for attempted first-degree robbery by means of a dangerous and deadly weapon (P.C.App. A89).[2]

After the remand by the Missouri Court of Appeals, the state circuit court granted respondent relief on June 24, 1982. The court ordered relief on the basis of the Missouri Supreme Court's decisions in *State v. Morgan*, 612 S.W.2d 1 (Mo. banc 1981) (construing §565.003, RSMo 1978 (repealed October 1, 1984)) and *State v. Olds*, 603 S.W.2d 501 (Mo. banc 1980) (construing §565.003, RSMo 1978 (repealed October 1, 1984)), which found the conviction for underlying felony to be jeopardy-barred by the felony murder conviction. Respondent's conviction and sentence for attempted first-degree robbery by means of a dangerous and deadly weapon were vacated (P.C.App. A82). The circuit court left intact respondent's first-degree murder conviction and life sentence. The time previously served on the attempted robbery conviction was credited toward completion of the first-degree murder sentence. *Thomas v. State*, 665 S.W.2d 621, 625 (Mo.App., E.D. 1983) (P.C.App. A70-A71). On appeal, respondent argued that the circuit court was obliged to resentence him on the first-degree murder conviction, and the resentencing was jeopardy-barred. The Missouri Court of Appeals, Judges Parrish and Pudlowski and Senior Judge James A. Finch, affirmed the circuit court's procedure. *Id.*

2. For background information concerning the former commutation program, respondent refers the court to *Love v. Black*, 597 F.Supp. 1092 (E.D. Mo. 1984) and *Parrish v. Wyrick*, 589 S.W.2d 74 (Mo.App., W.D. 1979).

Respondent filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. §2254 on August 1, 1984, in the United States District Court for the Eastern District of Missouri. This petition presented only the present double jeopardy claim. Without the need of an evidentiary hearing, the Magistrate filed his Review and Recommendation on March 29, 1985. He found respondent's claim meritorious and recommended that a writ of habeas corpus be granted (P.C.App. A55). On June 28, 1985, the District Judge rejected the Review and Recommendation and denied respondent's application for a writ of habeas corpus (P.C.App. A51). The Judge found that respondent suffered from no multiple punishment because the life sentence for first-degree murder was a sentence authorized by the Missouri Legislature. Respondent had not suffered punishment greater than that intended by the Legislature (P.C.App. A53-A54). Respondent filed a notice of appeal to the Eighth Circuit (J.App. 14).

On April 3, 1987, a panel of the United States Court of Appeals for the Eighth Circuit issued three separate opinions the effect of which was to reverse the judgment of the district court and to remand the case to the state courts for resentencing or retrial. *Thomas v. Morris*, 816 F.2d 364, 371 (8th Cir. 1987) (P.C.App. A24). Two members of the panel, Circuit Judge McMillian and Senior District Judge Hanson, agreed that respondent had legally satisfied the sentence he received for the attempted robbery conviction and that the subsequent vacation of that sentence and respondent's continued confinement under the first-degree murder conviction violated the Double Jeopardy Clause, but could not agree on the remedy necessary to correct the double jeopardy violation. *Id.* at 367. Additionally, Circuit Judge Bowman did not

believe that a double jeopardy violation had occurred because respondent was serving only one sentence (life) for one conviction (first-degree murder). *Id.* at 374 (Bowman, J., dissenting in part). Nonetheless, he joined with Senior District Judge Hanson in holding that any double jeopardy violation which had occurred could be corrected by the state courts by either resentence or retrial. *Id.* at 371, 372. Circuit Judge McMillian, in a separate concurring and dissenting opinion, opined that the double jeopardy violation could not be cured either by resentencing or retrying respondent on the lesser included offenses of first-degree murder, and thus, Thomas should be granted an unconditional writ. *Id.* at 371 (McMillian, J., concurring in part and dissenting in part).

Both petitioner and respondent filed petitions for rehearing *en banc*. Upon rehearing, the court divided into two opinions. Circuit Judge McMillian, writing for himself and Judges Lay, Heaney, Arnold and Magill, concluded that the state court's efforts to cure the double jeopardy violation were in vain; thus, an unconditional writ should issue. *Thomas v. Morris*, 844 F.2d 1337, 1342 (8th Cir. 1988) (*en banc*) (P.C.App. A2). Circuit Judge Bowman, writing for himself, John Gibson, Fagg and Wollman, dissented. They reasoned that respondent had not suffered multiple punishment due to the effective grant of post-conviction relief by the Missouri state courts. The dissent articulated that the majority's position was "preposterous." *Id.* at 1345. Following the court's denial of petitioner's petition for rehearing *en banc* (P.C.App. A1), a petition for a writ of certiorari was filed by petitioner. On January 9, 1989, this Court granted that petition and allowed respondent to proceed *in forma pauperis* (J.App. 17).

SUMMARY OF THE ARGUMENT

The United States Court of Appeals for the Eighth Circuit ordered respondent discharged because the prohibition against multiple punishment in the Double Jeopardy Clause had been violated. Inherent to the concept of the Double Jeopardy Clause or multiple punishment is the concept of "double" or "multiple." At present, respondent is convicted of first-degree murder for which he received a sentence of life imprisonment. Conspicuously missing from the description of petitioner's crime and sentence is a multiple conviction or multiple punishment.

The lack of multiple punishment is due to the Missouri state courts' cure of a perceived double jeopardy violation. At one time, the state courts found respondent's double jeopardy rights were violated because respondent had been sentenced for attempted robbery and first-degree murder. When the state courts vacated the attempted robbery conviction and credited the time served toward completion of the first-degree murder sentence, respondent's double jeopardy rights were vindicated. There is no principle in Missouri state law or federal constitutional law that precluded the state courts from granting respondent relief. Respondent received all the relief to which he might have been entitled. In these circumstances, the Court of Appeals erred by granting respondent further relief. The judgment of the United States Court of Appeals for the Eighth Circuit should be reversed.

ARGUMENT

RESPONDENT IS NOT ENTITLED TO HABEAS CORPUS RELIEF BECAUSE HIS DOUBLE JEOPARDY RIGHTS WERE PROTECTED BY THE MISSOURI STATE COURTS. AS RESPONDENT PROPERLY RECEIVED RELIEF FROM THE STATE COURTS, HE IS ENTITLED TO NO FURTHER RELIEF THROUGH A WRIT OF HABEAS CORPUS.

On April 21, 1988, the United States Court of Appeals for the Eighth Circuit, in a five to four vote, found that respondent was entitled to habeas corpus relief. 28 U.S.C. §2254(a). The Court of Appeals believed respondent had satisfied his life sentence for first-degree murder without serving a single day of it. The Court believed respondent had satisfied his life sentence by serving only eight years of his fifteen-year sentence for attempted robbery. Through a series of fortuitous events, respondent fell through a judicially manufactured crack in the criminal justice system. *See, Thomas v. Morris*, 844 F.2d 1337, 1343 n. 1 (8th Cir. 1988) (*en banc*) (Bowman, J., dissenting). Petitioner strongly disagrees.

On April 21, 1988, the date of the Court of Appeals' opinion, there was one judgment against respondent for one crime (first-degree murder). This one judgment sentenced respondent to one punishment (life imprisonment). From these facts, the Court of Appeals found a violation of the Double Jeopardy Clause of the Fifth Amendment. The majority could only find the "violation" by ignoring the state-court remedy for an earlier perceived Double

Jeopardy Clause violation.[3] This Court has properly exercised its discretion to review the judgment of the Court of Appeals. Since the State has fully cured the earlier double jeopardy violation, respondent is not entitled to a writ of habeas corpus. This Court should reverse the judgment of the Court of Appeals and order that respondent's Petition for a Writ of Habeas Corpus be denied.

A. The state court had power to fashion its own remedy to protect respondent's Double Jeopardy Clause rights.

During the Rule 27.26 litigation, the state circuit court found respondent's Fifth Amendment double jeopardy rights[4] were violated by his conviction for both first-degree murder and the underlying felony (P.C.App. A82). Seven years after respondent's conviction, the Missouri Supreme Court determined that the Missouri General Assembly did not intend multiple punishments for felony murder and the underlying felony.[5] *State v. Morgan*,

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3. The parties have proceeded under the assumption that respondent's first-degree murder conviction was based on a felony murder theory. This assumption may be unfounded. The jury was instructed on conventional first-degree murder (Tr. 254-255) and felony first-degree murder (Tr. 256). The jury found respondent guilty of first-degree murder without denominating the instruction or the theory of guilt (Tr. 259). Given the abundance of evidence of "deliberation" and "premeditation" (Tr. 256), the victim's six gunshot wounds, the procurement of the gun (Tr. 189), respondent's statement concerning the crime (Tr. 188-189), etc. the jury could easily have found respondent guilty of conventional first-degree murder (Tr. 254-255).

4. The Due Process Clause of the Fourteenth Amendment incorporates the Fifth Amendment's prohibition against placing a defendant twice in jeopardy. *Benton v. Maryland*, 395 U.S. 784 (1969).

5. Ironically, the Missouri Legislature immediately reenacted the felony murder statutes to allow multiple punishments in 1984. *See*, §565.021.2, RSMo 1986. *See, Thomas v. Morris*, 844 F.2d at 1343 n. 1.

612 S.W.2d 1 (Mo. banc 1981); *State v. Olds*, 603 S.W.2d 501 (Mo. banc 1980).[6] Since there was a perceived violation of the Double Jeopardy Clause of the Fifth Amendment, it is not surprising that respondent received state post-conviction relief from the Circuit Court of the City of St. Louis under Missouri Supreme Court Rule 27.26 (repealed effective January 1, 1988). The state circuit court granted respondent relief by vacating the conviction for attempted robbery and setting aside the fifteen-year sentence (P.C.App. A82). The circuit court left intact respondent's first-degree murder conviction and life sentence. The time respondent served towards completion of his attempted robbery sentence was credited towards service of the life sentence for first-degree murder (P.C. App. A70-A71). This remedy fully cured the perceived violation of respondent's Double Jeopardy Clause rights. After the state post-conviction litigation, respondent had one conviction for first-degree murder. Respondent was serving only one sentence (life) for first-degree murder. After the state post-conviction litigation, respondent had only served time towards completion of his sentence for first-degree murder. The state court's relief cured the double jeopardy violation. There is no reason for this Court to hold ineffective the state court's grant of relief.

The United States Court of Appeals declared that the state circuit court had no power to vacate the attempted robbery conviction and sentence because former Governor Christopher Bond had previously commuted the sentence for the attempted robbery conviction (P.C.App. A89). *See, Thomas v. Morris*, 844 F.2d at 1340. Whether

6. Both cases construe the 1977 homicide code. Neither case held that the Legislature did not intend multiple punishment for the statutory scheme under which respondent was convicted.

the state circuit court had the power or jurisdiction to vacate the attempted robbery conviction is not an issue for the federal court. Generally, a state-court's determination of its jurisdiction or power is binding on the federal court. *See, e.g., Martin v. Solem*, 801 F.2d 824, 831 (8th Cir. 1986). The availability of remedies in state court is an issue of state law, not federal law. *Feeney v. Auger*, 808 F.2d 1279, 1283 (8th Cir. 1986); *see, Wainwright v. Goode*, 464 U.S. 78, 84 (1983) (state court's determination of state law binding on federal court).

The state circuit court determined that it had the power and jurisdiction to enter an order vacating the attempted robbery conviction. The state court heard respondent's double jeopardy claim, resolved its merits and ordered that respondent receive relief. The state court did not find a procedural bar, *i.e.*, the lack of custody due to the commutation, Missouri Supreme Court Rule 27.26(b)(1), to preclude a grant of relief. *Cf., Ulster County Court v. Allen*, 442 U.S. 140 (1979) (recognizing that state courts may ignore their own procedural bars). Even if there had been a bar to relief due to the Governor's commutation, the State of Missouri waived that procedural defense when it was not asserted to the Rule 27.26 circuit court.[7]

Additionally, the procedural-bar defense was waived when the State did not cross-appeal the circuit court's

7. The State's assertion of this procedural defense would have been a mere formality. If respondent had not fulfilled the state court's custody requirement under Missouri Supreme Court Rule 27.26(b)(1), then the trial court would, nonetheless, have retained jurisdiction to consider the double jeopardy claim via a *writ of error coram nobis*. *Dixon v. State*, 594 S.W.2d 360, 361 (Mo.App., W.D. 1980); *Dearing v. State*, 631 S.W.2d 328 (Mo. banc 1982).

grant of relief to the Missouri Court of Appeals.[8] The state circuit court determined that it had jurisdiction to vacate the conviction and sentence for attempted robbery. The Court of Appeals for the Eighth Circuit offered no rationale to justify its holding that the state circuit court had no power to vacate the previously commuted sentence. Given the binding interpretation of state law by the state courts, the Court of Appeals' analysis is clearly wrong.

Respondent received relief sufficient to cure the double jeopardy violation from the state court. An analogy to the federal habeas corpus statute, 28 U.S.C. §2254, will help to illustrate the power and jurisdiction of the Missouri state circuit court to grant relief notwithstanding the Governor's commutation. If respondent had filed his habeas corpus petition in 1977, the year he filed his state court action, and had received his Governor's commutation in 1981, then a federal court, under 28 U.S.C. §2254, would have ruled in 1982, the year the state circuit court granted relief, that only the attempted robbery conviction needed to be vacated. Federal habeas corpus jurisdiction attaches at the filing of the petition. This jurisdiction cannot be defeated by the state's executive's use of parole, pardon or commutation. *See, e.g., Jones v. Cunningham*, 371 U.S. 236 (1963) (parole). Federal habeas corpus jurisdiction exists even though a sentence is completed pending consideration of the petition. If a federal court maintains the power to vacate the attempted robbery conviction, notwithstanding the executive action, *see,*

8. There was no strategic reason for the State to cross-appeal. After the Rule 27.26 circuit court litigation, respondent continued to serve a life sentence for first-degree murder.

Carafas v. LaVallee, 391 U.S. 234, 239 (1968) (unconditional release); *United States v. Hearst*, 638 F.2d 1190, 1192 n. 2 (9th Cir. 1980) (Presidential commutation), *cert. denied*, 451 U.S. 938 (1981); *United States ex rel. Grundset v. Franzen*, 675 F.2d 870 (7th Cir. 1982) (commutation); *Robson v. United States*, 526 F.2d 1145, 1147 (1st Cir. 1975) (pardon), then the state judge is well within his power and, indeed is obliged by his oath, to grant relief for the double jeopardy violation.

Since the federal court would have had power to vacate the attempted robbery conviction and sentence notwithstanding the Governor's commutation, there is no reason to deny the state courts the power. The state courts' use of that power cured the previous double jeopardy violation. Given the state courts' cure of the violation, respondent is not entitled to discharge from custody.

B. The Double Jeopardy Clause did not prohibit the state court's vacation of the attempted robbery conviction with the time served on that sentence's being credited toward completion of the first-degree murder sentence.

The Court of Appeals held that the Double Jeopardy Clause, as interpreted by this Court in *Ex parte Lange*, 85 U.S. (18 Wall.) 163 (1873), and *In re Bradley*, 318 U.S. 50 (1943), precluded the state court's vacation of the attempted robbery conviction. *Thomas v. Morris*, 844 F.2d at 1340. Petitioner submits that the Court of Appeals' interpretation of this Court's prior opinions and the Double Jeopardy Clause is inaccurate.

1. Respondent had not already "legally satisfied" the attempted robbery sentence when the state circuit court vacated the attempted robbery conviction and sentence.

The Court of Appeals held that since respondent had "legally satisfied" the sentence for attempted robbery (through the Governor's commutation), the Double Jeopardy Clause's prohibition against multiple punishments for a single offense precluded the state court's vacation of the attempted robbery conviction. *Id.* The federal court held that under Missouri law, respondent had legally satisfied his sentence for attempted robbery. *Id.* The state circuit court and state court of appeals, however, implicitly ruled that respondent had not "legally satisfied" his attempted robbery sentence when they ordered that sentence and conviction vacated. *Thomas v. State*, 665 S.W.2d 621, 625 (Mo.App., E.D. 1983) (P.C. App. A70; P.C.App. A82). The Court of Appeals' opinion did not discuss why its interpretation of state law was superior to that interpretation by the state courts. To the contrary, it is the Missouri state courts that have the inherent expertise to interpret state law. Furthermore, the Court of Appeals does not discuss why it has any right to reinterpret the state-law concept of "legal satisfaction" of the sentence. The Court of Appeals had no such right to reinterpret state law. *See, Ricketts v. Adamson*, ... U.S. ....., 107 S.Ct. 2680, 2684 n. 3 (1987); *Wainwright v. Goode*, 464 U.S. at 84.

For the Court of Appeals to ignore the state court's finding that respondent had not legally satisfied his attempted robbery sentence, the Court of Appeals implicitly had to find that the concept of "legal satisfaction" of a sentence for double jeopardy purposes was a federal

concept that would be entitled to *de novo* review in federal court. The Court of Appeals implicitly federalized the state law concept of "legal satisfaction." Even if the concept of "legal satisfaction" of a sentence were a federal concept, that federal concept would be interwoven with the state-law concept. Petitioner does not believe there is any principled way to separate and distinguish the state- and federal-law concepts. Petitioner believes that it is impossible to find a sentence "legally satisfied" for double jeopardy purposes, but not "legally satisfied" for state-law purposes. Under the Court of Appeals' logic, respondent had "legally satisfied" a vacated sentence for attempted robbery. How can a vacated sentence be satisfied? The Court of Appeals did not explain.

For these reasons, even if there is an independent federal concept of "legal satisfaction" of a sentence, petitioner submits that the federal concept has little if any meaning without reference to the state-law concept. Since there has been a finding by the state circuit court and the state court of appeals that respondent had not "legally satisfied" his attempted robbery sentence under state law, the Court should find that the attempted robbery sentence was not "legally satisfied" for purposes of Double Jeopardy Clause analysis.

2. Even if respondent had "legally satisfied" the attempted robbery sentence, the state court continued to have power to vacate the conviction and sentence.

Even if the Court were to find that respondent had "legally satisfied" his sentence for attempted robbery, neither *Lange* nor *Bradley* require the first-degree murder conviction and sentence to be vacated. In *Ex parte Lange*,

the defendant had been found guilty of the federal offense of stealing mail bags and had been sentenced to one year imprisonment and a two-hundred-dollar fine. The applicable statute provided that the maximum punishment was imprisonment of one year or a two-hundred-dollar fine. The defendant paid the fine and served five days of the sentence before the sentencing judge heard his habeas petition. Recognizing his error, the sentencing judge entered an order vacating the conviction and sentence and resentenced the defendant to one year in jail. This Court held that the district court could not resentence the defendant after he had paid the fine. Once one punishment had been suffered, *"the power of the court to punish further was gone."* 85 U.S. at 176 (emphasis added).[9]

In *In re Bradley*, a similar situation occurred. In *Bradley*, the federal court sentenced the defendant to six months' imprisonment and a fine of $500 even though the statute only permitted a fine or imprisonment. On September 28, 1942, Bradley was incarcerated. On October 1, 1942, Bradley's attorney paid the fine to the clerk. Later that day, the court *amended* the sentence to omit the fine. The court instructed the clerk to return the fine money. Since the attorney would not accept it, the clerk continued to possess the money. Again, this Court held that the resentencing of the defendant was a nullity because the fine portion of the alternative punishments had been satisfied. Since there was full satisfaction of the punishment, "the power of the court was at an end." *In re Bradley*, 318 U.S. at 52.

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9. The Court interpreted *Ex parte Lange* in *United States v. Benz*, 282 U.S. 304, 307 (1931) to prohibit an *increase* in the penalty upon resentencing. This prohibition against an increase in sentence upon resentencing was rejected by the Court in *Bozza v. United States*, 330 U.S. 160, 166-167 (1947).

Neither *Lange* nor *Bradley* control this case. First, the state post-conviction circuit court vacated the attempted robbery conviction and sentence. The state circuit court expressly did not "resentence" or "amend" the first-degree murder conviction and sentence.

> The conviction of the movant on Count II, murder in the first-degree, entered on May 2, 1973, and the sentence by the trial judge of movant to life imprisonment entered on May 25, 1973, are to remain in full force and effect and are not to be disturbed by this Order and Decree.

[P.C.App. A82.] In *Lange* and *Bradley*, the sentencing court had to vacate the initial judgment in order to attempt to resentence. This Court held that when one of the alternative punishments were satisfied, the sentencing court had no power to *amend* the judgment or *resentence* the defendant to the alternative non-satisfied punishment.

With the present case, however, the double jeopardy prohibition against multiple punishment did not prohibit the state circuit court action. The *Lange* and *Bradley* prohibition against multiple punishment does not apply since the first-degree murder conviction was not vacated or amended and respondent was not resentenced. Respondent recognized this on state post-conviction appeal when he argued that the state court was obliged to vacate the first-degree murder conviction and resentence respondent. *Thomas v. State*, 665 S.W.2d at 625 (P.C. App. A70). Respondent attempted to invoke the *Lange* and *Bradley* proscription against amending the judgment or resentencing. The Missouri Court of Appeals ruled that there was no requirement that the first-degree murder conviction be vacated and that petitioner be resen-

tenced since respondent received credit for the time he served for attempted robbery. *Id.* (P.C.App. A70-A71).

There is a second significant distinction between *Lange* and *Bradley* and the present case. In both *Lange* and *Bradley*, the defendants filed their challenges to the sentences *after* they paid their fines. No challenge occurred until after one of the alternative punishments had been legally satisfied. In the present case, however, respondent began his state post-conviction litigation in 1977, long before the commutation. As discussed earlier (Brief, *supra* at pp. 11-15), in neither state court nor federal court does a commutation or other executive branch action strip the reviewing court of power to adjudicate the lawfulness of convictions and sentences. If either Lange or Bradley had filed a challenge to his sentence before he paid the fine, then that challenge should have been considered on its merits even if the defendant later paid the fine.

There is a third significant distinction between *Lange* and *Bradley* and this case. In *Lange* and *Bradley*, the court was faced with alternative punishments of incarceration and a fine for a single crime. The nature of those two alternative punishments is quite different. Obviously, payment of a fine is less intrusive of individual liberties. A return of fine money to Lange and Bradley would not make them whole for the government's violation of their double jeopardy rights. Crediting respondent with the time he served on the attempted robbery conviction toward completion of the first-degree murder sentence, however, did make respondent whole. The state court remedy cured the double jeopardy violation. Because the nature of the alternative punishments was

different and because the fine and imprisonment were unauthorized cumulative punishments for a single statutory offense, this Court held that the Double Jeopardy Clause was implicated in *Lange* and *Bradley*. Such is not the case with the present case.

This Court has recognized the fungible nature of time served toward completion of a sentence in *North Carolina v. Pearce*, 395 U.S. 711 (1969). In *Pearce*, the Court interpreted the Double Jeopardy Clause to mandate that when resentencing is required following an appellate reversal and a new trial, time already served under the old sentence should be credited towards completion of the new sentence. This requirement avoids the Double Jeopardy Clause prohibition against multiple punishments for a single offense. *Id.* at 718-719. Accordingly, in the present case, when the attempted robbery conviction was vacated by the state circuit court, the time respondent had served on that conviction was credited toward completion of the first-degree murder sentence. There was no multiple punishment because the state circuit court fashioned relief that cured the double jeopardy violation.

The alternative sentences of fines and imprisonment in *Lange* and *Bradley* were not interchangeable. In the present case, alternative sentences of imprisonment are interchangeable. The sentences of imprisonment are fungible, as recognized by this Court in *North Carolina v. Pearce*. The significance of the fungible nature of prison terms is particularly important in this case since, when respondent was sentenced in 1973, the illegality of the sentences had not yet been established. It was not until the Missouri Supreme Court's decisions, in 1980 and 1981 with *State v. Morgan*, 612 S.W.2d 1 and *State v. Olds*,

603 S.W.2d at 501, that it became known that respondent's sentences might be illegal. In 1973, the sentencing court could not possibly have known that its imposition of a sentence for each conviction would later be found unlawful. Unlike *Lange* and *Bradley*, the sentencing judge had no clear precedent or statutory guidance that prohibited his sentences. Rather, the sentencing judge's actions were made in good faith reliance of existing law. Unlike *Lange* and *Bradley*, there was no intent by the sentencing judge that respondent serve two punishments for a single offense. Rather, the judge intended two punishments for two offenses: attempted robbery and first-degree murder. When it became clear that an error had been made, the state court corrected the error by vacating one conviction and sentence. In the end, respondent had one conviction for one crime and had one sentence. That hardly constitutes multiple punishment.

When the state circuit court granted relief in accordance with *North Carolina v. Pearce*, 395 U.S. at 718-719, it resolved respondent's double jeopardy rights' violation. In accordance with *State v. Olds*, 603 S.W.2d at 501 and *State v. Morgan*, 612 S.W.2d at 1, respondent is serving only the sentence imposed on one of his two original convictions. The Double Jeopardy Clause does not require that respondent be giver the choice of which of two simultaneously imposed prison sentences he is to serve when it transpires that he may not be made to serve both.

Fourth, in *Bozza v. United States*, 330 U.S. 160 (1947), this Court upheld a resentencing by the trial court from a defendant's double jeopardy challenge. In *Bozza*, the statute required the defendant to be sentenced to a prison term and a fine. The sentencing judge imposed only

a prison sentence. Five hours later, recognizing his mistake, the sentencing judge resentenced the defendant to imprisonment and a fine. The court distinguished *Lange* and *Bradley* by noting that Bozza had not suffered lawful punishment until the court had announced the full mandatory sentence of imprisonment and a fine. *Bozza v. United States*, 330 U.S. at 167 n. 2. In the present case, respondent suffered no lawful punishment for attempted robbery since that conviction and sentence were vacated.

Further, the double jeopardy prohibition does not prohibit resentencing under *Bozza*. This type of analysis rightfully focuses upon the intent of the sentencing judge.

> Petitioner contends, however, that these cases are inapplicable here because correction of this sentence so as to make it lawful increases his punishment. . . . If this inadvertent error cannot be corrected in the manner used here by the trial court, no valid and enforceable sentence can be imposed at all. . . . This Court has rejected the "doctrine that a prisoner, whose guilt is established by a regular verdict, is to escape punishment altogether because the court committed an error in passing the sentence." . . . The Constitution does not require that the sentencing should be a game in which a wrong move by the judge means immunity for the prisoner. . . . In this case the court "only set aside what it had no authority to do, and substitute[d] directions required by the law to be done upon the conviction of the offender." . . . It did not twice put petitioner in jeopardy for the same offense. The sentence[,] as corrected, imposes a valid punishment for an offense instead of an invalid punishment for that offense.

Bozza v. United States, 330 U.S. at 166-167 (footnote omitted). In the present case, the court need not focus on the lawfulness of resentencing since respondent was not resentenced for first-degree murder when the state circuit court vacated the attempted robbery conviction and sentence. Rather, the Court should be concerned with the effectiveness of the state post-conviction court's grant of relief. As the state court grant of relief reflected the intent of the sentencing judge, further relief that is inconsistent with that intent is unwarranted under the Double Jeopardy Clause.

Given the court's rationale in *Bozza*, it should make no difference whether respondent's attempted robbery sentence was unexecuted, partially executed or totally executed when respondent's attempted robbery sentence was vacated. In 1973, the sentencing judge made a "wrong move" by sentencing petitioner for both the attempted robbery and first-degree murder convictions. Furthermore, it is a mere fluke that the attempted robbery conviction was Count I and that the first-degree murder conviction was Count II of the judgment. If the counts had been reversed, with the life term being served first, this case would not be before the Court. If the sentences had been concurrent, this case would not be before the Court. The federal constitutional law should not be based upon such vagaries as which crime is in which Count of the charging document.

To the extent either *Lange* and *Bradley* require the result of the Court of Appeals, then *Lange* and *Bradley* should be reversed. In that situation, *Lange* and *Bradley* frustrate the legitimate intent of the sentencing judge and turn sentencing into a game. This Court rightfully rejects that interpretation of the Double Jeopardy Clause. *Bozza v. United States*, 330 U.S. at 166-167. In fact,

since *Lange* and *Bradley*, courts have restricted those cases to their facts. *See, e.g., id.; United States v. DiFrancesco*, 449 U.S. 117 (1980); *United States v. Busic*, 639 F.2d 940 (3d Cir.), *cert. denied*, 452 U.S. 918 (1981). When the sentencing judge sentenced respondent to the maximum term for attempted robbery and the consecutive maximum term for first-degree murder and ordered them served consecutively, the judge was expressing society's outrage about the heinous nature of respondent's actions. If *Lange* and *Bradley* stifle the judge's expression of societal concern, then *Lange* and *Bradley* need to be reversed.[10]

In light of this Court's ruling in *United States v. DiFrancesco*, 449 U.S. at 117, other circuits allow the vacation of the shorter of two consecutive sentences after it has been fully served. *Rollins v. United States*, 543 F.2d 574 (5th Cir. 1976); *cf., United States v. Hodges*, 628 F.2d 350, 353 (5th Cir. 1980); *United States v. Busic*, 639 F.2d at 953. These courts reason that such resentencing is necessary to preserve the original sentencing judge's intent. Further, the Seventh Circuit and the Eighth Circuit allow vacation of the shorter sentence of two concurrent sentences even though it has been fully served. *See United States v. Leathers*, 271 F.2d 80 (7th Cir. 1959), *cert. denied*, 363 U.S. 831 (1960); *Hardy v. United States*, 292 F.2d 192 (8th Cir. 1961). This Court recognized the importance of the sentencing judge's intent in *Green v. United States*, 365 U.S. 301 (1961). In the present case, the 1973 sentencing judge intended that respondent serve a natural life sentence. The original error in sentencing respondent was made in good-faith reliance

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10. A hypothetical illustrates: If a defendant receives the death penalty and a fine when the statute only authorizes one or the other, then petitioner submits that the defendant should not be allowed to discharge his punishment by merely paying the fine.

on 1973 Missouri law. The 1980 change in Missouri law and the ensuing commutation of the attempted robbery sentence should not be available for respondent as a basis for nullifying the first-degree murder sentence. The state circuit court fashioned relief that vindicated the intent of the original sentencing court had the illegality of the double sentencing been apparent in 1973. Given these circumstances, respondent is not entitled to having his first-degree murder conviction and sentence vacated.

C. The Court of Appeals erroneously declined to remand the case to the state trial court for resentence or retrial for a nonjeopardy-barred offense.

The panel opinion by the Court of Appeals allowed the state trial court to resentence or retry respondent for a nonjeopardy-barred homicide, *i.e.*, second-degree murder, §559.020, RSMo 1969 (repealed September 28, 1975), and manslaughter, §559.070, RSMo 1969 (repealed September 28, 1975). *See, Thomas v. Morris*, 816 F.2d 364, 370-371 (8th Cir. 1987). The panel majority would allow resentencing unless respondent could demonstrate that without the improper inclusion of the jeopardy-barred charge, there was a reasonable probability that he would not have been convicted of the lesser offense. *Thomas v. Morris*, 816 F.2d at 371, *citing, Morris v. Mathews*, 475 U.S. 237 (1986).

The panel's dissent on this issue declined to apply the rule in *Morris v. Mathews*. Instead, the dissent preferred the Sixth Circuit's approach in *Mathews v. Marshall*, 754 F.2d 158, 162 (6th Cir. 1985), *rev'd sub nom. Morris v. Mathews*, 475 U.S. 237 (1986). *See, Thomas v. Morris*, 816 F.2d at 371 (McMillian, J., dissenting).

Writing for the *en banc* majority, Judge McMillian again declined to apply *Morris v. Mathews*. Rather, the

Court ordered respondent discharged from custody. The majority *en banc* opinion reasoned:

> The critical difference between *Mathews* and the present case is that the defendant in *Mathews* had not fully satisfied either the sentence for aggravated robbery or the sentence for the felony murder. In the present case[,] Thomas has fully satisfied the sentence for attempted robbery. This same important distinction runs through the cases of *Lange, Bradley, Edick, Holmes* and *Holbrook*, a distinction which we find determinative here.

Thomas v. Morris, 844 F.2d at 1342. The dissent would have returned the case to state court for proceedings under *Morris v. Mathews*. *Id.* at 1346 (Bowman, J., dissenting).

The State believes that it should be allowed to resentence or retry respondent under *Morris v. Mathews*. By the jury's verdict, the jury inherently found respondent guilty of manslaughter, §559.070, RSMo 1969. *See, State v. Stapleton*, 518 S.W.2d 292, 299 (Mo. banc 1975) (defining elements of manslaughter). The jury also may have found respondent guilty of second-degree murder, §559.020, RSMo 1969. *See, State v. Franco*, 544 S.W.2d 533, 535 (Mo. banc 1976) (defining elements of second-degree murder). Under *Morris v. Mathews*, the State should be allowed to resentence respondent to the lesser offense unless respondent can demonstrate prejudice.[11]

Alternatively, the State should have the option to reprosecute respondent for the homicide. Since respondent was not acquitted of conventional first-degree mur-

---

11. Since respondent had a prior conviction (Tr. 208), he was sentenced under the provisions of the Second Offender Act (Tr. 270). This provision allowed sentencing by judges. Section 556.280(1), RSMo 1969 (repealed January 1, 1979).

der (Tr. 259),[12] the State should be allowed the opportunity to try respondent for conventional first-degree murder, second-degree murder or manslaughter. *Thomas v. Morris*, 816 F.2d at 371 n. 3.

The majority *en banc* opinion would not allow the State to resentence or retry respondent. *Thomas v. Morris*, 844 F.2d at 1342. The majority *en banc* opinion declined to apply *Morris v. Mathews* because respondent had satisfied the sentence for attempted robbery, *id.* at 1342, whereas Mathews had not completed his sentence for aggravated robbery. This factual difference is not, however, worthy of a legal distinction. Whether respondent had or had not completed the attempted robbery sentence should not be determinative of whether he can be retried or resentenced for a *nonjeopardy-barred* offense.

The panel's opinion's dissent suggests, *Thomas v. Morris*, 816 F.2d at 371 (McMillian, J., dissenting), *citing*, *Morris v. Mathews*, 106 S.Ct. at 1044 (Brennan, J., dissenting), but the *en banc* majority opinion does not adopt, *Thomas v. Morris*, 844 F.2d at 1342, an idea that respondent cannot be resentenced or retried because all charges should be prosecuted in a single proceeding. *Thomas v. Morris*, 816 F.2d at 371 (McMillian, J., dissenting), *citing*, *Morris v. Mathews*, 106 S.Ct. at 1044 (Brennan, J., dissenting). That idea was tempered by the majority in *Morris v. Mathews* when the Court noted that resentencing Mathews for murder would avoid a retrial. *Morris v. Mathews*, 106 S.Ct. at 1038. Likewise, allowing the State to resentence respondent would avoid a retrial.

---

12. As discussed earlier, respondent may have, in fact, been convicted only of conventional first-degree murder (Brief, *supra* at p. 11 n. 3).

Further, the vacation of respondent's conviction and sentence for first-degree murder should be deemed procedural in nature. There is no express or implied acquittal of respondent for first-degree murder (Tr. 259), second-degree murder or manslaughter. Retrial after a successful appeal on a procedural ground is not barred by the Double Jeopardy Clause. *North Carolina v. Pearce*, 395 U.S. at 719-720, *citing*, *United States v. Ball*, 163 U.S. 662 (1896). This is because a retrial should not be deemed a separate proceeding; rather, it is a continuation of the original proceeding against the respondent. *See, United States v. Tateo*, 377 U.S. 463, 466-467 (1964) (allowing retrial after vacation of conviction in collateral proceeding). The Double Jeopardy Clause should not prevent respondent's resentencing or retrial.

CONCLUSION

Petitioner respectfully requests that this Court reverse the judgment of the United States Court of Appeals for the Eighth Circuit and grant such other relief as it deems appropriate.

Respectfully submitted,

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RESPONDENT'S

BRIEF

BEST AVAILABLE COPY

QUESTIONS PRESENTED

The Petitioner prison Superintendent states the question as follows:

> *Whether the United States Court of Appeals for the Eighth Circuit could overturn a state-court granted remedy for a double jeopardy violation as being contrary to that federal court's understanding of state law.*

Respondent Larry P. Thomas would state the questions presented as follows:

> 1. *Where the criminal defendant is convicted of felony murder in the course of attempted robbery, and also of its lesser included offense of attempted robbery, and admittedly in violation of the double jeopardy clause receives a fifteen year sentence for the attempted robbery and life imprisonment for the murder, with the fifteen year sentence to be served FIRST, and after serving part of the fifteen year sentence it is commuted by the Governor, does it violate the Double Jeopardy Clause of the United States Constitution, Fifth Amendment, for the state court to set aside the fully served commuted sentence and enforce the life imprisonment sentence, that is does fully serving the commuted sentence satisfy the judgment so that the court's power to further punish the defendant is gone, and further punishment violate the double jeopardy clause?*
>
> 2(a) Did the state court violate the provisions of the United States Constitution forbidding ex post facto law, namely, Art.I, § 9, C1.3, and Art.I, § 10, C1.1, when by its judgment, the state court reached back in time to set aside the fully served commuted sentence which had been granted Thomas by the Governor of Missouri under the Governor's exclusive Missouri Constitutional power to commute sentences as granted in said Constitution's Article 4, § 7, and by taking away the commuted sentence making Thomas' situation more onerous? And,

2(b) *Did the taking away of the fully served commuted sentence which Missouri had granted Thomas, and holding it for naught, also violate the due process clause of the Fourteenth Amendment of the United States Constitution?*

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit *en banc*, directing the writ of habeas corpus be issued by the District Court is reported as *Thomas* v. *Morris*, 844 F.2d 1337 (8th Cir.en banc 1988). It is reproduced in the Petition for Certiorari Appendix—hereinafter referred to as "P.C.App."—at A2).

The three-judge panel of the United States Court of Appeals for the Eighth Circuit wrote three different opinions in *Thomas* v. *Morris*, and they are found at 816 F.2d 364 (8th Cir.1987), and are reproduced at P.C.App.A24.

The opinion of the United States District Court for the Eastern District of Missouri denying the petition for habeas corpus is unpublished, but is reproduced at P.C.App.A51.

The U.S. Magistrate's Review and Recommendation recommending the issuance of a writ of habeas corpus is unpublished but reproduced at P.C.App.A55.

Judgment and Sentence of the Missouri Circuit Court for the City of St. Louis of May 25, 1973 sentencing Respondent Larry Thomas to fifteen years for attempted robbery, and upon expiration of the fifteen years, the sentence of life imprisonment for the felony murder is to begin. Judgement reproduced in the Joint Appendix ("J.A.") at pages 8,9, and 10.

The opinion of the Missouri Court of Appeals, St. Louis District on the direct appeal of the conviction reproduced at P.C.App.A84, and reported as *State* v. *Thomas*, 522 S.W.2d 74 (Mo.App.1975).

Unconditional commutation in full of the 15-year sentence for attempted robbery for Governor Christopher S. Bond of Missouri, signed 6/12/81, and effective 6/16/81.

Findings of Fact, conclusions of Law and Order of the Court by Judge Richard Mehan of the Circuit Court for the City of St. Louis, filed 6/24/82, approximately a year after commutation of the 15-year sentence. Reproduced at P.C.App.A73.

Opinion of the Missouri Court of Appeals, Eastern District in the appeal of the ruling of Judge Mehan of 6/24/82 on Larry Thomas' post-conviction motion. Reproduced at P.C.A.App.A65, and reported as *Thomas* v. *State*, 665 S.W.2d 621 (Mo.App.1983).

JURISDICTION

The Court has jurisdiction to consider this case pursuant to *28 U.S.C. § 1254(1)*. The opinion of the United States Court of Appeals was entered April 21, 1988 (P.C.App.A2). The said Court denied a timely petition for rehearing by Petitioner Superintendent Jones on June 9, 1988 (P.C.App.A1). The Petition for a Writ of Certiorari was filed on Sept. 7, 1988, and this Court granted it on January 9, 1988 (Joint Appendix—Hereinafter "J.A."—J.A.17).

APPLICABLE CONSTITUTIONAL STATUTORY PROVISIONS

United States Constitution

Article 1, § 9, clause 3:

> No Bill of Attainder or ex post facto Law will be passed.

Article 1, § 10, clause 1:

> Section 10. No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

The Fifth Amendment to the United States Constitution:

> No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation.

2. Section 1 of the Fourteenth Amendment to the United States Constitution:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

The Constitution of Missouri

Article 4, § 7

> **§ 7. Reprieves, commutations and pardons—limitations on power**
>
> Section 7. The governor shall have power to grant reprieves, commutations and pardons, after conviction, for all offenses except treason and cases of impeachment, upon such conditions and with such restrictions and limitations as he may deem proper,

subject to provisions of law as to the manner of applying for pardons. The power to pardon shall not include the power to parole.

Missouri Statutes

Section 556.150, RSMo 1969 (repealed January 1, 1979) provides, in relevant part:

Every person who shall attempt to commit an offense prohibited by law, and in such attempt shall do any act toward the commission of such offense, but shall fail in the perpetration thereof, or shall be prevented or intercepted in executing the same, upon conviction thereof, shall, in cases where no provision is made by law for the punishment of such attempt, be punished as follows:

(1) If the offense attempted to be committed be such as is punishable by the death of the offender, the person convicted of such attempt shall be punished by imprisonment in the penitentiary for a term not less than two nor exceeding fifteen years.

5. Section 559.010, RSMo 1969 (repealed September 28, 1975) provides:

Every murder which shall be committed by means of poison, or by lying in wait, or by any other kind of willful, deliberate and premeditated killings, and every homicide which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or mayhem shall be deemed murder in the first degree.

Section 560.120, RSMo 1969 (repealed January 1, 1979) provides:

Every person who shall be convicted of feloniously taking the property of another from his person, or in his presence, and against his will, by violence to his person, or by putting him in fear of some immediate injury to his person; or who shall be convicted of

feloniously taking the property of another from the person of his wife, servant, clerk or agent, in charge thereof, and against the will fo such wife, servant, clerk or agent by violence to the person of such wife, servant, clerk or agent, or by putting him or her in fear of some immediate injury to his or her person, shall be adjudged guilty of robbery in the first degree.

Missouri Rules

Missouri Supreme Court Rule 27.26 (repealed January 1, 1988) provides, in pertinent part:

A prisoner in custody under sentence and claiming a right to be released on the ground that such sentence was imposed in violation of the Constitution and laws of this state or the United States, or that the court imposing such sentence was without jurisdiction to do so, or that such sentence was in excess of the maximum sentence authorized by law or is otherwise subject to collateral attack, may file a motion at any time in the court which imposed such sentence to vacate, set aside, or correct the same.

STATEMENT OF THE CASE

On Nov. 8, 1972, Respondent Larry P. Thomas (hereinafter simply "Thomas") went with a companion to hold up an auto parts store. There was a customer in the store, one Mentoe Vernell, who according to the state's evidence, reached out for Thomas who had a gun in his hand. Both men began firing, the state's evidence being Thomas fired first, a matter which was disputed. Three bullets struck Thomas and four struck Vernell. Vernell fell to the floor and Thomas fell on top of him. (Tr. 65,67,113,114,117,139, and 225). The police arrived. Both Vernell and Thomas were conveyed to the hospital. Thomas recovered but Vernell died (Tr. 154,228).

Thomas was charged with attempted robbery and first degree felony murder in the course of attempted robbery. He was convicted of both and sentenced to fifteen years for the attempted robbery. This sentence was to be served *FIRST*. Then consecutive to it was to be served a sentence of life imprisonment for the felony murder (J.A. 8,9,10). On direct appeal, the Missouri Court of Appeals affirmed the judgment and convictions. (See P.C.A.A84-A87, or *State* v. *Thomas*, 522 S.W.2d 74 (Mo.App.1975). Motions for rehearing and for transfer to the Missouri Supreme Court were denied (P.C.A.A84).

January 24, 1977, Thomas filed (P.C.A.81) a post-conviction motion pursuant to *Missouri Supreme Court Rule 27.26* (later repealed Jan.1, 1988). The Missouri Circuit Court denied the motion, and on January 15, 1981, in an unpublished order, the Missouri Court of Appeals, Eastern district, summarily vacated the state circuit trial court's order dismissing the motion due to an inability to complete the transcript, and Thomas' then attorney, Gail Gaus, amended the motion on March 27, 1981. (P.C.A.,A81,A82).

On June 21, 1981, Missouri's Governor Bond granted an unconditional commutation of Thomas' fifteen year sentence, the commutation to be effective four days later on June 16, 1981. Thus, at the time the Governor signed the commutation, Thomas was under the two sentences, that is a fifteen year sentence for attempted robbery, which was the lesser included offense of the felony murder in the course of attempted robbery. Four days later the commuted sentence was *fully served*.

One year and twelve days later, on June 24, 1982, a Missouri Circuit Judge, Richard J. Mehan, entered his order overruling Thomas' post-conviction Rule 27.26 motion, except that the judge chose to simply set aside

the fifteen year conviction which had been commuted by the Governor over a year before. This left Thomas with the sentence of life imprisonment in full force and effect (P.C.A.,A82). Actually, Judge Mehan's order does *not* credit the time served on the 15-year sentence against the life sentence. See "Conclusions of Law and Order and Decree" of Judge Mehan at P.C.A.,A82,A83.

However, in the opinion ruling the appeal from the post-conviction motion denial (P.C.A., A65-A72; *Thomas* v. *State*, 665 S.W.2d 621 [Mo.App.1983]), the appellate court states in ruling Thomas' double jeopardy claim that the time spent serving the 15-year sentence was credited to the life imprisonment sentence (P.C.A.,A70,A71). Motions for rehearing and transfer to the Missouri Supreme Court were denied (P.C.A.,A65). Thus, Thomas was compelled to serve another sentence in addition to the commuted sentence.[1]

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[1] Footnote 1, page 5 of Petitioner Jones' brief is highly misleading in its statement that "there was no doubt there was no constitutional problems with the convictions" for which it cites *State* v. *Overstreet*, 551 S.W.2d 621 (Mo.banc 1977). The footnote is no doubt referring to *Overstreet*, *supra*, at 551 S.W.2d 630[6] where the Court becomes nonsensical saying that "In summary, where a homicide is prosecuted under the felony-murder rule, the other felony does not become, *a fortiori* merged in or an element of the offense of murder, and the defendant may be prosecuted for both the homicide and the underlying felony without being twice placed in jeopardy if the conviction of each offense requires proof of essential elements not required for conviction of the other."

It is nonsensical because to prove the felony murder, one must prove the felony, and every element of the felony is thus included in the murder. Cf. *Whalen* v. *United States*, 445 U.S. 684, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980). Even Perry Mason knew better citing three old California double jeopardy cases in Earl Stanley Gardiner's detective novel, *Perry Mason Solves the Case of the Lucky Loser*,

Since, the decision on *Thomas* v. *State*, *supra*, meant Thomas must serve a life sentence in addition to the fully served commuted sentence for what he claimed was only one crime, and since the Missouri Legislature had not decreed double punishment (See *State* v. *Morgan*, 612 S.W.2d 1 (Mo.banc 1981), Thomas filed as a state prisoner for a writ of habeas corpus under *Title 28 U.S.C. § 2254*, filing his petition in the U.S. District Court for the Eastern District of Missouri.

When the matter was referred to a U.S. Magistrate for a review and recommendation, the Magistrate found (P.C.A., A55-A64) Thomas' claim meritorious and recommended the writ of habeas corpus be issued. Citing such cases as *Ex Parte Lange*, 18 Wall. 163, 85 S.Ct. 163 (1873); *In re Bradley*, 318 U.S. 51 (1943), *United States* v. *Edick*, 603 F.2d 772 (9th Cir.1979), *Holbrook* v. *United States*, 136 F.2d 649 at 652 (8th Cir.1943), the Magistrate held Thomas had fully satisfied one sentence by commutation before the (state) court vacated the (15-year) sentence, and this Court's power to punish Thomas was gone. Among other things, the magistrate quoted *Ex parte Lange*, *supra*, where it said:

> We are of the opinion that when the prisoner by reason of a valid judgment, had fully suffered one of the alternative punishments to which alone the law subjected him, the power of the court to punish further was gone 85 U.S. at 176.
>
> This court is of the same opinion regarding the case at bar.

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copyright 1956 by the Curtis Publishing Co, Standard Book Number 671-55852-8. The citations are in Chapt.12 One of the cases was *People* v. *Ny Sam Chung*, 94 Cal. 304, 29 P. 642, 28 American State Reports 129.

On June 28, 1985, the district court rejected the Magistrate's recommendation, holding on the basis of *Missouri* v. *Hunter*, 459 U.S. at 366, 103 S.Ct. at 678, that "the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended".[2] This district court declined to issue a writ of habeas corpus (P.C.A51-A54) and Thomas appealed to the United States Court of Appeals for the Eighth Circuit. It was at this point that the undersigned lawyer was appointed to represent Thomas by the Eighth Circuit Court, under the Criminal Justice Acts (J.A.2,3).

After briefing, the case was orally argued before three judges, i.e., judges McMillian and Bowman, Circuit judges, and Senior District Judge Hanson sitting by designation. Judge Bowman would have affirmed the district court. Judges McMillian and Hanson would reverse the district court but could not agree upon a remedy. Judge McMillian would grant the writ. Judge Hanson agreed Thomas had legally satisfied the sentence Thomas had received for attempted robbery would send the case back to the Missouri Court so that Thomas could be tired on a "non-jeopardy barred lesser included offense" or else for resentencing.[3] *Thomas* v. *Morris*, 816 F.2d 364 or P.C.App.A24-A50.

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[2] The district judge completely ignored the fact that Thomas had served one complete lawfully commuted sentence for what is legally one crime, and the legislature had not decreed there should be two punishments. It also ignores the fact that the legislature under Missouri law may not interfere with the Governor's power to pardon and commute. See *Parrish* v. *Wyrick*, 589 S.W.2d 74 (Mo.App.1979). *Missouri Constitution*, *Art.4*, *§ 7*.

[3] Thomas submits this makes no sense in the light of *Whalen* v. *United States*, 445 U.S. 684, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980).

Both parties moved for rehearing suggesting a rehearing en banc. or P.C.App.A24. The motions were granted. The case was heard before nine judges (P.C.App.A2-A23). Five judges agreed an unconditional writ of habeas corpus should issue. Four judges dissented.

The majority held Thomas had fully satisfied his robbery sentence, that the crime was legally one offense, for which it cited *Ex parte Lange*, 18 Wall. 163, 21 L.Ed.2d 872 (1874); *In re Bradley*, 318 U.S. 50, 63 S.Ct. 470, 87 L.Ed. 608 (1943); *United States* v. *Edick*, 603 F.2d 772 (9th Cir. 1979), and *United States* v. *Holmes*, 822 F.2d 481 (5th Cir.1987).

The majority felt the critical factor was Thomas had legally satisfied one of the illegally imposed multiple sentences (and had done so before the state court had attempted its erroneous correction of sentence. The Court instructed the district court to issue the writ. (P.C.App.A12,A14). *Thomas* v. *Morris*, 844 F.2d 1337.

The minority felt the intention of the sentencing judge had been ignored.[4] It rejected what it felt to be a "sporting approach" (P.C.App.19), and the Governor's commuting of Thomas' robbery sentence as part of a series of

[4] Neither the minority nor the majority opinion discusses the point Thomas made in his brief that the state court's judgment by which it vacated the fifteen year sentence, and in effect, set the Governor's commutation of the sentence at naught, was an *ex post facto* judgment which reached back in time to vacate a fully served sentence and make Thomas' condition more onerous. Respondent Thomas will submit that if the prisoners who had earned good time off had a "protected liberty interest" which could not be taken away without serious misconduct (see *Weaver* v. *Graham*, 450 U.S. 24 [1981]), so did Thomas. And the Supreme Court has held that Courts may not enter judgments that have an ex post facto effect. See *Bouie* v. *City of Columbia*, 378 U.S. 347, 84 S.Ct. 1697, 12 L.Ed.2d 894 (1964).

"fortuitous events" (P.C.App.14). Of course, it gave no legal effect to the Governor's commutation, (Perhaps, because the Governor was not an almighty court.)

Jimmy Jones, the Superintendent of the Missouri Training Center for men then petitioned the 8th Circuit for a rehearing en banc which was then denied. Next, he petitioned this Court for a writ of Certiorari to the 8th Circuit. The petition was granted and the undersigned attorney, Springfield Baldwin, was appointed by the Supreme Court to act as Respondent Larry P. Thomas' attorney.

While the record does not specifically show why the Governor of Missouri commuted Larry Thomas' attempted robbery sentence, it was probably done to shorten his time in prison. At an early age Thomas was orphaned. His sister went on to become a school teacher and Thomas became what is sometimes called "a street boy". In prison, possibly under his sister's beneficent influence, Thomas completed his high school equivalency, and then completed two years of college with grades of A and B. He felt he could still make something of his life. The undersigned attorney succeeded in getting Thomas freed on a writ of habeas corpus only three days or possibly four, before Thomas was due to go on parole. He is presently employed and is earning a living.

SUMMARY OF THE ARGUMENT

Whether there is a violation of the Fifth Amendment's Double Jeopardy Clause is a federal question, and any state court devised remedy for such violation must meet federal standards.

In the instant case, as the state court admitted, there was a violation. But the state court's remedy did not meet

federal standards. Respondent Larry Thomas had been convicted of felony murder in the course of attempted robbery. He received life imprisonment for the murder and 15 years for the attempted robbery. The attempted robbery was a lesser included offense of the felony murder. Therefore, the two crimes were legally only one crime, and since the Missouri Legislature had not decreed double punishment, the two sentences, which were voidable were illegal. The 15-year sentence was to be served *FIRST*.

BEFORE any court acted to "correct" Thomas' sentences, the Governor of Missouri by his exclusive Missouri Constitutional power commuted Thomas' 15-year sentence. Thomas' legal position was then as if he had been originally sentenced to the same term of imprisonment as the commuted sentence.

HOWEVER, when Thomas had completely served his commuted sentence for what was legally *one crime*, Thomas was entitled to go free for the Double Jeopardy Clause operated so as to entitle him to freedom from double punishment. The Missouri Legislature had not decreed double punishment. The Missouri court therefore erred when it set aside the 15-year sentence and deprived Thomas of his commuted sentence which the Missouri Governor had granted and had a right to grant irrespective of any court's intention or of any legislative intention.

The Missouri Court not only erred by violating the Double Jeopardy Clause, it also erred by entering an ex post facto judgment violative of provisions of the U.S. Constitution's ex post facto provisions, i.e., *Art.I, § 9, and Art.I,§ 10*. It was also a wrongful deprivation of a liberty interest protected by the due process clause of the *XIVth Amendment*. The Supreme Court should affirm the 8th Circuit judgment for the foregoing reasons.

ARGUMENT

The Missouri Attorney General's brief filed as the brief of Superintendent Jone's brief certainly can mix things up and make them unclear.

First comes the "Question Presented" of the brief which was whether the 8th Circuit could overturn a state-court granted remedy for a double jeopardy violation as being contrary to that federal court's understanding of state law.

The answer is the question is irrelevant because the 8th Circuit did no such thing. Instead, the 8th Circuit decided the state court had not applied federal law correctly. This method of deciding the case is perfectly proper because of the holding of *Benton* v. *Maryland*, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969).

In *Benton* at 395 U.S. 794 it is held in part that:

> ". . . we today find that the double jeopardy prohibition of the Fifth Amendment represents a fundamental ideal in our constitutional heritage, and that is should apply to the States through the Fourteenth Amendment. . ."
>
> This Court also held in *Benton*, *supra*, at 395 U.S. 796 that the matter would be judged . . . under this Court's interpretations of the Fifth Amendment double jeopardy provision."

The Court also pointed to the fundamental nature of the guarantee against double jeopardy, that its origins could be traced to Greek and Roman times, that it became established in the common law of England and was carried into the jurisprudence of this country through Blackstone's Commentaries, that the underlying notion is fundamental to the American scheme of justice, and matters must be judged by "this Court's interpretations of the

Fifth Amendment double jeopardy provision. (*Benton, supra*, at 395 U.S. 795[11]-796).

The foregoing argument also answers Petitioner Jones argument "A." on page 11 of his brief, that the state court had power to fashion its own remedy to protect respondent's Double Jeopardy Clause rights." If its "own remedy" was in accord with *federal standards*, the contention would be correct. But its "own remedy" was *not* in accord with federal standards as will appear.

1. *Where the criminal defendant is convicted of felony murder in the course of attempted robbery, and also of its lesser included offense of attempted robbery, and admittedly in violation of the double jeopardy clause receives a fifteen year sentence for attempted robbery and life imprisonment for the felony murder, with the fifteen year sentence to be served FIRST, and after serving part of the fifteen year sentence it is commuted by the Governor, does it violate the Double Jeopardy Clause of the United States Constitution, Fifth Amendment, for the state court to set aside the fully served commuted sentence and enforce the life imprisonment sentence, that is, does fully serving the commuted sentence satisfy the judgment so that the court's power to further punish the defendant is gone, and does further punishment violate the double jeopardy clause?*

Thomas was convicted of felony murder in the course of attempted robbery, and of attempted robbery (J.A. 8-10) with the 15-year sentence for attempted robbery to be served *FIRST*, and then a life sentence for the felony murder was to be served next and consecutively to the 15-year sentence. In order to prove 1st degree felony murder *(See.559.010 RSMo 1969, repealed 9/28/75)*, one had to prove the underlying felony as well as the killing in the

course of the felony. Thus, in Thomas' case, every fact included in the underlying felony of attempted robbery had to be proved when one proved felony murder in the course of the attempted robbery. In such a situation, the test in *Blockberger* v. *United States*, 284 U.S. 299 was met. This test was again stated in *Whalen* v. *United States*, 445 U.S.684 at 692 100 S.Ct. 1438 as follows:

> In the Blockberger case the Court held that the "applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of a fact which the other does not.

Since, when felony murder in the course of attempted robbery is proved no new fact need be proved to prove attempted robbery, the two *are legally one crime. Whalen* v. *United States, supra.*

Whalen, supra, also held that the Double Jeopardy Clause of the *Fifth Amendment of the Constitution of the United States* prohibits punishing a single criminal offense with multiple punishments unless the legislature had made it clear multiple punishment for what appeared to be multiple crimes should be imposed. The Missouri Supreme Court had decided in *State* v. *Morgan*, 612 S.W.2d 1 (Mo banc 1981) the Missouri legislature did not intend double or multiple punishments. But since the Double Jeopardy Clause of the *Fifth Amendment* applies to the states through the *Fourteenth Amendment of the United States Constitution (Benton* v. *Maryland*, 395 U.S. 784), Thomas' right to be free of Double Jeopardy was violated when he received two punishments for what was legally one crime.

The two sentences of 15 years and life imprisonment were legitimate *alternatives* of the law. But when they

were both imposed the sentences were illegal *but not void*. They were *only voidable*. *Ex parte Lange*, 18 Wall. 163, 85 U.S. 872 (1874).

One notes the Supreme Court also reapproved *Lange* in *Whalen*, *supra*, when it stated at 445 U.S. 688[4], 100 S.Ct. 1436[4]:

> ". . . But if a penal statute instead provided for a fine *or* a term of imprisonment upon conviction, a court could not impose both punishments without running afoul of the double jeopardy guarantee of the Constitution. See *Ex parte Lange*, supra at 176, 21 L.Ed. 872. . ."

BEFORE any court attempted to "correct" the double jeopardy violation of two voidable sentences which Thomas had suffered, along came the Governor, Christopher S. Bond of Missouri and commuted Thomas' 15-year sentence (P.C.App.,A81). The Governor does not state in the commuting document what the "good and sufficient reasons appearing" are. But were the Court to send for the prison record it would find Thomas had completed his high school equivalency, had completed two years of college with grades of A and B, and had time off for good behavior.

In any event, the "Commutation of Sentence" was signed on June 12, 1981, to be effective June 16, 1981. The commutation became effective and still no court had acted to "correct" Thomas' sentencing.

No Court has held that the Governor of Missouri had no power to commute the voidable 15-year sentence. In fact, the Governor of Missouri had a Missouri Constitutional power to commute the sentence for *Article 4, § 7 of the Missouri Constitution* provides in part:

> The governor shall have power to grant . . . commutations . . ., after conviction, for all offenses except treason and cases of impeachment, upon such conditions . . . as he may deem proper, subject to provisions of law as the manner of applying for pardons. . .

Since, the 15-year sentence was *not void* there is surely no reason the Governor's commutation should not be effective. Indeed, to set aside such a commutation which is what the state court really did when it "vacated" the 15-year sentence violates the Missouri Constitutional separation of powers. Larry Thomas had a "protectible liberty interest". If time earned is time served is a "protectible liberty interest" how much more so is a commuted sentence? It surely must be. See *Wolff* v. *McDonnell*, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974). If good time credits created a "liberty interest" protected by due process guarantees *(Greenholtz* v. *Inmates of Nebraska Penal and Correctional Complex*, 442 U.S. 1, 99 S.Ct. 2100, 60 L.Ed.2d 668 (1979), how much more protected must be a fully vested lawfully commuted sentence be protected as a matter of due process through the *Fourteenth Amendment of the Constitution of the United States?*

In Missouri, commutation of sentence is the sole prerogative of the Governor, and neither Court nor Legislature can interfere with it. *Parish* v. *Wyrick*, 589 S.W.2d 74 (Mo.App.1979).

Therefore, the commutation of sentence which the Governor granted to Larry Thomas cannot be taken away from him by a Court.

When Larry Thomas had served completely the cummutated sentence four days after the Governor signed the commutation document, *he had fully served one complete*

sentence for what was legally only one crime, and the legislature had not decreed double punishment. Thus, under *Whalen* v. *United States*, *supra*, to leave a sentence of life imprisonment imposed on Thomas violated the Double Jeopardy Clause. This is also in accord this with the Supreme Court's holdings in *Ex parte Lange*, 18 Wall. 163, 85 U.S. 872, 21 L.Ed. 872 (1874), and in *In re Bradley*, 318 U.S. 50 (1943), and with the 9th Circuit case of *United States* v. *Edick*, 603 F.2d 772 (9th Cir.1979), and the 8th Circuit case of *Holbrook* v. *United States*, 136 F.2d 652 (8th Cir. 1943), and the 5th Circuit case of *United States* v. *Holmes*, 822 F.2d 481 (5th Cir.1987).

(Of course, after the commutation, Thomas' legal position was the same as if his sentence for attempted robbery had been for the same length of time as elapsed from the time of sentencing to the time of commutation, and *he had satisfied the sentence under Missouri law. State* v. *Cerny*, 248 S.W.2d 844,845 (Mo.1952)). The legal effect of a commutation of sentence is also dealt with in *67 A C.J.S.46, Pardon Parole, paragraph 35*. It states:

> ". . . After commutation, the sentence has the same legal effect, and the status of the prisoner is the same as though the sentence had originally been for the commuted term."

One notes in the Missouri case of *State* v. *Brookshire*, 377 S.W.2d 291 at 292[2], the Missouri Supreme Court commenting on the fact that Brookshire's three year sentence had been commuted to a term ending Nov. 29, 1963, stated:

> ". . . There can be no question but that appellant had been unconditionally discharged from the above referred to sentence . . . He isn't now and has not since November 29, 1963 been in custody under that sentence."

From the foregoing it is perfectly obvious that the answer to Question Presented 2(b), as framed by the undersigned, is that the taking away of the fully served commuted sentence violated the due process clause of the *Fourteenth Amendment*.

It also is obvious from this Court's previous decisions, and the decisions of the 9th and 8th Circuit that vacating the 15-year sentence, which had been commuted and as commuted fully served, violated the *Fifth Amendment's* Double Jeopardy Clause. Those decisions are discussed below:

In *Ex parte Lange*, 18 Wall. 163, at 165, 85 U.S. 872,875, 21 L.Ed. 872 (1874), where the prisoner had been convicted of stealing mail bags, and the authorized punishment was either a fine *or* imprisonment (*but not both)*, and *both* had been imposed, and the prisoner's lawyer paid the fine, the Court stated:

> The petitioner, then having paid court the fine imposed . . . and having also undergone five days of the one year's imprisonment, all under a valid judgment, can the court vacate that judgment entirely, and without reference to what has been done under it, impose another punishment on the prisoner on that same verdict? To do so is to punish him twice for the same offense. He is not only put in jeopardy twice, but put to actual punishment twice for the same thing. . .

And the *Lange* Court said in part at 85 U.S. 879:

> ". . . It thus showed the court that its power to punish for that offense was at an end. Unless the whole doctrine of our system of jurisprudence, both of the Constitution and the common law, for the protection of personal rights in that regard, are a nullity, *the authority of the court to punish the prisoner further is gone. The power was exhausted;* its further

> exercise is prohibited. It was error but it was error because the power to render any further judgment did not exist. (emphasis supplied.)

Thus, by *Lange*, when Thomas had *completed* service of his 15-year sentence, which the court had order to be served *FIRST*, the power of the Missouri courts to compel service of the life sentence was *GONE*. *It was exhausted. It did not exist.*

It was *not* left to the prisoner to choose which sentence he was to serve. That choice was made for him by the operation of the law of the Double Jeopardy Clause.

Forty seven years later, in *United States* v. *Benz*, 282 U.S. 304, 51 S.Ct. 113, 75 L.Ed. 354 (1943), the Supreme Court again approved *Lange*, *supra*, saying in part at 282 U.S. 310:

> ". . . the majority opinion (in *Lange)* merely holds that a new sentence of imprisonment alone cannot be imposed after payment of the fine, *which operated as a satisfaction of the prior judgment* . . ." (emphasis suppled)

Thus, in the instant case, when Thomas had completed service of his commuted 15-year sentence, and his legal position was the same as if he had originally been sentenced to such a term of imprisonment (as shown above), *he had satisfied the judgment*, satisfying one of the alternative penalties of the law, and the power of the Missouri Court to require service of the life imprisonment sentence was *GONE* by operation of law. *Lange*, and *Benz*, *supra*.

Twelve years later the matter came up again in *In re Bradley*, 318 U.S. 50, 63 S.Ct. 470, 87 L.Ed. 608 (1943). The prisoner, Bradley, had intimidated a witness in a corridor next to the court during a trial. He was adjudged guilty of contempt of court. The court sentenced him to

pay a fine of $500 *and* to be imprisoned for six months. Under the statute, either of these sentences could have been imposed, *but not both*.

Bradley paid his fine, and then the Court realized its mistake, amended the sentence and omitted the fine. The prisoner petitioned for certiorari. The Supreme Court held at 318 U.S. 52:

> "When . . . the fine was paid . . . the petitioner had complied *with a portion of the sentence* which could have lawfully been imposed. *As the judgment of the court was thus executed to be a full satisfaction of one of the alternative penalties of the law*, the power of the court *was at an end*. (emphasis supplied.)

Thus, when Thomas had fully served his lawfully commuted 15-year sentence, the trial court's judgment *was executed and fully satisfied*. The Missouri court's subsequent amendment of the judgment to require service of the life sentence was a *nullity*. Thomas was entitled to be freed. *Lange*, *Benz*, *Bradley*, *supra*.

The case of *United States* v. *Edick*, 603 F.2d 772 (9th Cir. 1979), though weaker than the instant case for the Governor's power to commute sentences should not be set at naught by the federal courts, is otherwise somewhat similar. In *Edick*, the district court had imposed two consecutive 10-year sentences when only one was authorized by Congress. The Court had reduced the sentence on Count I, and Edick had served it. The 9th Circuit concluded at 703 F.2d 778:

> "[7,8] We conclude that the district court had lost the power to resentence Edick on Count II *once he had satisfied his sentence on Count I*. We remand to the district court to vacate the three year sentence on Count II imposed upon revocation of Edick's probation." (emphasis supplied.)

In *Holbrook* v. *United States*, 136 F.2d 649 (1943), the facts were different. In *Holbrook*, the defendant had been convicted of two offenses under the bank robbery statute and received two sentences. The 8th Circuit held this violated the double jeopardy clause. But the *different fact was* the defendant *had not satisfied either sentence*. Thus, the 8th Circuit held at 136 F.2d 652[3]: the question of which of the two consecutive sentences should be eliminated could properly be determined by the trial court "*up to the time there had been a legal satisfaction of one of the sentences*. . "

Thus, from all the foregoing it emphatically appears that the United States Court of Appeals for the Eighth Circuit was absolutely correct in ordering Thomas freed on a writ of habeas corpus for he had legally satisfied the Missouri Court's judgment. Any other holding would be fundamentally unfair. And any other holding by the Supreme Court of the United States would screw up the law and be different from what it has been for over 115 years. It would also be plain error in that it would be a judgment with an *Ex Post Facto* effect which this Court has held is forbidden by the *United States Constitution*. This will now be discussed.

So that the Court might avoid plain error, the undersigned attorney on behalf of Respondent Thomas raised the following question among the questions presented:

> 2(a) *Did the state court violate the provisions of the United States Constitution forbidding ex post facto laws, namely, Art.I,§9, C1.3, and Art. I, §10, C1.1, when by its judgment the state court reached back in time to set aside the fully served commuted sentence which had been granted Thomas by the Governor of Missouri under the Governor's exclusive Missouri Constitutional power to commute sentences as granted in said Constitution's Article 5,*

> *§ 7, and by taking away the commuted sentence making Thomas' situation more onerous?*

After Thomas had completed service of his 15-year commuted sentence, the Missouri trial court reached back in time and vacated the 15-year sentence. By the *Missouri Constitution, Art.4,§7*, Missouri had granted Thomas a commuted sentence. He served it, and it was thus fully vested. Then the Missouri Courts reached back in time and took away the 15-year sentence. This made Thomas' position far more onerous for having completely served the commuted sentence he had served one complete sentence for what was legally one crime. Thus, the action of the Missouri Courts bore a striking similarity to the action of Florida in *Weaver* v. *Graham*, 450 U.S. 24, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981). Of course in the instant case it was the Missouri court that entered an *ex pst facto* judgment while in *Weaver, supra*, it was the legislature. This makes no real difference for Courts are also forbidden to enter *ex post facto* judgments. *Bouie* v. *City of Columbia*, 378 U.S. 347, 84 S.Ct. 1697, 12 L.Ed.2d 894 (1964). In *Bouie*, at 378 U.S. 354, this Court held:

> ". . . If a state legislature is barred by the *Ex Post Facto* Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same effect by judicial construction. . ."

In *Wolff* v. *McDonald*, 418 U.S. 539 (1974), Nebraska prisoners had been given certain rights to earn time off their sentences so as to make them eligible for parole at an earlier date. Such time off could be forfeited only by serious misconduct. The Supreme Court held such rights could not be lightly taken away. It was a protected liberty interest and protected as a due process right.

The founding fathers regarded acts having an ex post facto effect as a great evil. So much importance did the Constitutional Convention attach to forbidding such action that they twice prohibited such action in the Constitution. *United States Constitution, Article I, § 9, C1.3*, and *Article I, § 10, C1.1*.

In *Weaver* v. *Graham*, *supra*, the prisoner had earned certain time off his sentence pursuant to Florida statute. The Florida legislature repealed the statute and enacted one more onerous to the prisoner. It was interpreted so as to deprive the prisoner of part of the time he had earned. This Court held the law to be ex post facto and unconstitutional. How could it possibly be that a court judgment that takes away the benefit of a fully served sentence and holds it for naught is not also ex post facto? Thomas respectfully submits the Missouri Court's judgment vacating his 15-year sentence and taking away his commuted sentence is an ex post facto judgment which reaches back in time and makes his condition more onerous by depriving him of the right to go free under the Double Jeopardy Clause.

This *is not a case where* some federal court has arbitrarily deprived a state court of the right to correct a judgment. Rather, *this is a case* where the Governor of Missouri lawfully gave Thomas a commutation of sentence, and a Missouri Court, reaching back in time to make Thomas' condition more onerous has taken away the benefit of a lawfully commuted sentence which it had no power to do for the power to commute or not commute is solely the Governor's Constitutional power under the Constitution of Missouri. *Parrish* v. *Wyrick*, 589 S.W.2d 74. Since, the commuted sentence had vested, the Missouri Court violated fundamental fairness, due process, and the ex post facto clauses of the United States Constitution for all the foregoing reasons. The Supreme Court

should affirm the judgment of the United States Court of Appeals for the Eighth Circuit. And incidentally, once the Governor commuted the 15-year sentence, the law of double jeopardy operated because Thomas had satisfied the judgment, then considerations of what the Legislature "intended" become irrelevant. The simple fact is what the Legislature intended or what the trial court intended cannot interfere with the Governor's power to commute. Under the separation of powers devised in the Missouri Constitution, it is only the Governor who has power to commute. And theoretically, if the Governor chose to commute a life sentence the day it was entered there is nothing to stop him, and it is a nonsensical argument to argue that the Legislature never intended it or the trial judge never intended it and therefore the commutation would be invalid, that is, it's nonsensical because the Missouri Constitution gave the Governor that power. This Court should not place itself in the position of setting the Missouri Governor's power to commute at naught. Nor should it foul up the law of ex post facto or the law of double jeopardy simply to send one man who is already rehabilitated back to prison. He was to be paroled three days after he was loosed by writ of habeas corpus.

Simply because some do not like a result is no reason to put bad law on the books.

CONCLUSION

For all the foregoing reasons the Supreme Court of the United States should affirm the judgment of the United States Court of Appeals for the Eighth Circuit and grant any other relief which may be meet in the premises.

Respectfully submitted,

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REPLY BRIEF

FOR ARGUMENT

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In The

Supreme Court of the United States

October Term, 1988

JIMMY JONES, Superintendent, Missouri Training Center for Men at Moberly,

Petitioner,

vs.

LARRY P. THOMAS,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY BRIEF OF PETITIONER

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ARGUMENT

The Court should not affirm the Court of Appeals' grant of habeas corpus relief to respondent on the basis of respondent's Ex Post Facto Clause theory and due process theory because (1) respondent did not present these theories to the United States District Court; (2) federal-court review of these theories is barred by an adequate and independent state procedural bar to review; and (3) the theories are meritless.

Respondent asserts that the procedure utilized by the Rule 27.26 trial court violated his rights under the *Ex Post Facto* Clause of the United States Constitution, art. I, §9, cl. 3; art. I, §10, cl. 1; and the Due Process Clause of the Fourteenth Amendment[1] (Respondent's Brief, pp. 22-25). The panel opinion of the Court of Appeals declined to consider this question because it was not presented to the District Court. *Thomas v. Morris*, 816 F.2d 364, 365-366 (8th Cir. 1987), *aff'd*, 844 F.2d 1337 (8th Cir. 1988) (en banc). Neither the majority nor the minority *en banc* opinions discuss the question. *Thomas v. Morris*, 844 F.2d 1337 (8th Cir. 1988) (en banc). This panel's practice is consistent with this Court's opinion in *Zant v. Moore*, 57 U.S.L.W. 4399 (U.S. No. 87-1104, Mar. 28, 1989) (dissent, Blackmun, J.). *Cf. Harris v. Reed*, ___ U.S. ___, 109 S.Ct. 1038 (1989) (discussing *Michigan v. Long* "plain statement" rule, 463 U.S. 1032 (1983)). The Court of Appeals was factually

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[1] Petitioner and respondent adequately discussed the Double Jeopardy Clause issue relied upon by the United States Court of Appeals for the Eighth Circuit in their opening briefs. In his reply brief, petitioner will discuss only the *Ex Post Facto* Clause and the Due Process Clause theories advanced by respondent in his brief (Respondent's Brief, pp. 22-25).

correct in declining to consider the *ex post facto*/due process issue. Respondent only presented a double jeopardy issue in his August 1, 1984 petition for writ of habeas corpus (Petition, supp. p. 5(a)-(b)). It is impossible to convict the district court of error with this issue when respondent declined to present the theory to the district court. Respondent failed to preserve the *ex post facto*/due process theory for review by this Court.

Even if the Court were to conclude that the issue were properly preserved for review, petitioner submits that federal-court review of the *ex post facto*/due process issue is barred due to an adequate and independent state procedural bar to review. Respondent failed to present his contention to the Missouri state courts during the Rule 27.26 litigation. Respondent's failure to provide the Missouri state courts with a fair opportunity to consider the claim constitutes an adequate and independent state procedural bar to review. *See, Gilmore v. Armontrout*, 861 F.2d 1061, 1065-1066 (8th Cir. 1988); *Stokes v. Armontrout*, 851 F.2d 1085, 1091-1092 (8th Cir. 1988), *cert. denied*, 109 S.Ct. 823 (1989); *Byrd v. Armontrout*, 686 F.Supp. 743, 753-754 (E.D.Mo. 1988), *appealed*, No. 88-1903EM (8th Cir.). Since respondent failed to provide the Missouri state courts with a fair opportunity to consider his *ex post facto*/due process claim, federal-court review of those claims is barred under the *Wainwright v. Sykes* doctrine. 433 U.S. 72 (1977).

In any event, respondent's claim is meritless. Under *Weaver v. Graham*, 450 U.S. 24 (1981), respondent must demonstrate that a criminal law is being applied retroactively and to his detriment. Respondent makes no such showing (Respondent's Brief, pp. 23-25). Respondent

argues that the Missouri Rule 27.26 courts took away his commutation (Respondent's Brief, p. 24). Petitioner disagrees. Respondent requested Rule 27.26 relief from the Missouri state courts. The state courts fashioned relief by vacating respondent's conviction and sentence for attempted robbery. The state courts did not "take" respondent's commutation away from respondent. Rather, the courts gave to respondent the relief he requested – vacation of the attempted robbery conviction and sentence. As discussed in the opening brief, the Missouri state courts had power to vacate the attempted robbery conviction and sentence as a matter of state law (Petitioner's Brief, pp. 11-15). In fact, this Court is considering currently whether a federal court, under 28 U.S.C. §2254(a), has power to vacate a conviction even though it has been fully served. *See, Maleng v. Cook*, ___ U.S. ___, 109 S.Ct. 363 (1988); *cf. Carafas v. LaVallee*, 391 U.S. 234 (1968) (unconditional discharge of habeas petitioner does not make petition moot).

Respondent argues that when the state courts vacated the fifteen-year sentence for attempted robbery, this action was detrimental to respondent. Petitioner, again, disagrees. The unlawful sentence for attempted robbery was vacated, and the time respondent had served towards completion of that sentence was credited towards the completion of the lawful sentence for felony murder. By eliminating the multiple punishment, the state courts granted respondent the relief he requested. Such requested relief could hardly be detrimental to respondent.

Since respondent's *ex post facto*/due process theory was not fairly presented the federal district court or to the state courts, review of that theory is procedurally barred. In any event, respondent's theories are meritless since respondent suffered no detriment by the state courts' granting respondent only the relief that he sought.

CONCLUSION

Petitioner respectfully requests this Court to reverse the judgment of the United States Court of Appeals for the Eighth Circuit and grant such other relief as this Court deems appropriate.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

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No. 88-420

In the Supreme Court of the United States

OCTOBER TERM, 1988

JIMMY JONES, PETITIONER

v.

LARRY P. THOMAS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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21pp

QUESTION PRESENTED

Respondent was convicted of attempted robbery and felony murder and was sentenced to consecutive terms of 15 years' and life imprisonment, respectively, for the two offenses. His 15-year sentence, which he began serving first, was commuted and was subsequently vacated by the Missouri state courts on the ground that the Missouri legislature did not intend to permit the imposition of consecutive sentences for felony murder and the felony that served as the predicate for the felony murder charge. The question presented in this case is whether, under these circumstance, the Double Jeopardy Clause required respondent's life sentence to be vacated because he had already completed the service of his 15-year sentence.

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In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-420

JIMMY JONES, PETITIONER

v.

LARRY P. THOMAS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

This case presents a recurring question regarding the reach of the Double Jeopardy Clause. In particular, it raises an issue as to how courts should give effect to the Clause's prohibition against imposing multiple punishments for the same offense. Although this is a state case, the court's resolution of the constitutional question in this case will affect the federal criminal justice system as well as the state systems. Because the constitutional issue presented here, or closely analogous issues, arise whenever a court vacates some portion of a multiple-count sentence and either directs the disposition of the remaining part of

the sentence or remands the case for resentencing, the United States has a substantial interest in the outcome of this case.

STATEMENT

1. On November 8, 1972, respondent attempted to rob an auto parts store in St. Louis, Missouri. During the course of the holdup, respondent engaged in a gunfight with one of the store's customers. Respondent shot and killed the customer. After a jury trial in the St. Louis Circuit Court, respondent was convicted of attempted robbery and first-degree felony murder. The felony murder charge was based on the fact that the customer was killed during the commission of a felony—the attempted robbery of the auto parts store. The trial court sentenced respondent to consecutive terms of 15 years' imprisonment on the attempted robbery count and life imprisonment on the felony murder count. The court directed that the 15-year sentence be served first. The Missouri Court of Appeals affirmed. Pet. App. A3; *State* v. *Thomas*, 522 S.W.2d 74 (Mo. App. 1975).

2. In 1977, respondent filed in state court a motion for post-conviction relief, claiming that it was improper for the trial court to impose separate, consecutive sentences for felony murder and the underlying felony of attempted robbery. In June 1981, while respondent's motion for post-conviction relief was pending, the Governor of Missouri commuted respondent's 15-year sentence for attempted robbery. Pet. App. A4. At that time, respondent had served approximately eight years of his 15-year sentence on the attempted robbery charge. Respondent remained in prison, however, because he still had to serve the life sentence that was imposed on the felony murder count.

Following the commutation order, the state trial court granted in part respondent's motion for post-conviction relief. The court ruled that the Missouri legislature "did not intend to allow separate and cumulative punishments for felony-murder and the underlying felony which produced the homicide." Pet. App. A70. Accordingly, the court vacated respondent's conviction and sentence for attempted robbery. The court did not disturb respondent's life sentence for the felony-murder conviction, but the court credited against respondent's life sentence all the time respondent had served under the 15-year sentence prior to the time that sentence was vacated. Pet. App. A4, A82-A83.

The Missouri Court of Appeals affirmed the trial court's ruling. Pet. App. A65-A72; *Thomas* v. *State*, 665 S.W.2d 621 (Mo. Ct. App. 1983). While agreeing that the trial court was correct in holding that separate sentences could not lawfully be imposed for the two offenses, respondent argued that the trial court had not granted him the proper relief. Under the Double Jeopardy Clause, he argued, he was entitled to immediate release, because he had already served one of the two sentences that had initially been imposed on him. Because he had completed serving the commuted 15-year sentence for attempted robbery, respondent argued, it was constitutionally impermissible for the state courts to vacate that sentence and require him to serve the remainder of the life term that had been imposed on the felony murder count. Pet. App. A66-A67.

The Missouri Court of Appeals rejected respondent's argument. It held that the Double Jeopardy Clause did not require that petitioner be released, since one of the two sentences imposed on him was lawful, and there was no justification for holding that the longer of the two sentences was the one that must be vacated. The court

noted that respondent was not prejudiced by the vacation of the sentence he had already completed serving, because the entire period of respondent's incarceration was being credited to the life sentence he was then serving on the felony murder charge. Pet. App. A70-A71.

3. Respondent then filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Missouri. In his petition, respondent renewed his double jeopardy claim and argued that he should be entitled to immediate release because he had already completed serving one of the two sentences originally imposed on him. The district court denied relief. Pet. App. A51-A54. The court held that respondent had not suffered a double jeopardy violation because "he is not being subjected to greater punishment than the legislature intended." *Id.* at A54.

4. A divided three-judge panel of the Eighth Circuit reversed and remanded. Pet. App. A24-A50. The panel majority concluded that as a result of the commutation of respondent's sentence by the Governor of Missouri, respondent completed serving his 15-year sentence for attempted robbery on June 16, 1981. Pet. App. A27-A29. Citing this Court's decisions in *Ex parte Lange*, 85 U.S. (18 Wall.) 163 (1873), and *In re Bradley*, 318 U.S. 50 (1943), the panel held that because respondent had completed the 15-year sentence before the state court vacated that sentence and ordered respondent to complete the life sentence that was imposed on the felony murder count, the state court's order violated the Double Jeopardy Clause. Pet. App. A30-A37. Under *Lange* and *Bradley*, the panel concluded, once respondent had completed one of the two sentences that could lawfully have been imposed in the first instance, he could not be forced to serve any portion of the other sentence, even if he were given credit toward

his life sentence for all the time he had served under the 15-year sentence. Pet. App. A36-A37.[1]

Judge Bowman dissented. In his view, the constitutional prohibition against multiple punishments for the same offense was not violated, because respondent is serving "only the sentence imposed on one of his two original convictions." Pet. App. A45. Although the State could not require him to serve both sentences, Judge Bowman explained, the Double Jeopardy Clause "does not require that [respondent] be given the choice of which of two simultaneously-imposed prison sentences he is to serve when it transpires that he cannot be made to serve both." *Ibid.* The "extreme hypertechnicality" of the panel's decision, Judge Bowman noted, is illustrated by the fact that respondent would not have to be released if the trial court had imposed concurrent, rather than consecutive sentences on the two counts; in that event, he would have to serve the remainder of his life sentence, without benefitting from the happenstance that the trial court ordered him to serve the 15-year sentence first. Pet. App. A48.

5. The Eighth Circuit granted rehearing en banc and in a 5-4 decision ordered that the writ of habeas corpus be issued. Pet. App. A1-A14. Like the panel, the en banc court concluded, first, that respondent had completed serving his sentence for attempted robbery. *Id.* at A7-A8. The court then interpreted *Ex parte Lange, supra*, and

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[1] Judge McMillian, who concurred in the panel's analysis of the double jeopardy issue, disagreed with Judge Hanson, the author of the plurality opinion, on the issue of remedy. Judge Hanson concluded that the State could cure the double jeopardy violation "by changing the jeopardy-barred felony-murder conviction to a non-jeopardy-barred lesser included offense" or by trying respondent for some lesser included offense. Pet. App. A39 & n.3. Judge McMillian disagreed. In his view, the only remedy for the double jeopardy violation was to order respondent released. Pet. App. A40-A41.

In re Bradley, supra, as standing for the proposition that a criminal defendant may not be punished further after he completes the service of a sentence that is one component of several "illegally imposed multiple sentences" Pet. App. A12. Accordingly, the court held that the state court's order requiring respondent to complete the service of his life sentence, even with credit for the period he had served under the vacated 15-year sentence, violated the Double Jeopardy Clause.[2]

The four dissenting judges stated that in their view, the Double Jeopardy Clause does not require that respondent be released from custody simply because he was deemed to have completed the sentence that the trial court happened to have ordered him to serve first. The dissenting judges observed that, under the majority's view of the law, respondent could be required to serve the life term for murder if the judge had directed that sentence to be served first. The dissent concluded that "it is little short of preposterous that the sequence in which the consecutive sentences were pronounced should provide a basis for [respondent's] early release" (Pet. App. A20-A21).

SUMMARY OF ARGUMENT

1. The Double Jeopardy Clause prohibits multiple punishments for the same offense. As this Court has held, that prohibition means only that a defendant may not

[2] With respect to the issue of remedy, the en banc court adopted the position Judge McMillian had taken, dissenting in part from the judgment of the panel. The en banc court concluded that because respondent had completed one of the two sentences that had been imposed on him, the State could not remedy the Double Jeopardy violation by substituting a conviction on a lesser included offense in place of the felony murder conviction, or by retrying respondent on a lesser included offense. Pet. App. A13-A14.

receive greater punishment than the legislature intended for his crime. Here, the Missouri courts ruled that the Missouri legislature intended to authorize punishment only for respondent's conviction for felony murder. Accordingly, the trial court reduced respondent's sentence to life imprisonment. Under that order respondent will not serve a greater sentence than the legislature authorized. Thus, respondent has not suffered unconstitutional multiple punishments for the same offense.

2. Respondent claims that the Double Jeopardy Clause establishes a special rule for multiple sentences. He asserts that, because he initially received unauthorized multiple sentences, he must be released since he has served one of the sentences even though it was the shorter one. That suggestion is not supported by any interest protected by the Double Jeopardy Clause. The sentencing court thought that respondent deserved to be sentenced to a penalty of life plus 15 years' imprisonment. The Missouri courts later determined that the legislature did not intend to authorize a penalty greater than life imprisonment. The interests of the Double Jeopardy Clause were satisfied, therefore, when the sentencing court reduced respondent's prison sentence to life.

3. This Court's decision in *Ex parte Lange*, 85 U.S. (18 Wall.) 163 (1873), does not support respondent. The Court in that case held that a defendant could not be fined and sentenced to prison where the criminal statute authorized either punishment but not both. As the Court has made clear in more recent cases, *Ex parte Lange* stands for the settled proposition that the Double Jeopardy Clause forbids punishment greater than the legislature authorized. The Missouri courts did not violate the prohibition in this case.

Nor should this Court's decision in *In re Bradley*, 318 U.S. 50 (1943), be read as supporting respondent's claim.

The Court held in *Bradley* that a defendant could not be fined and sentenced to prison where the statute allowed only one or the other punishment, even though Bradley's money used to pay the fine was returned to him when the judge learned of the error. That decision is consistent with this Court's later Double Jeopardy cases only if the Court believed that Bradley was punished by paying the fine even though his money was returned to him. If *Bradley* is to remain good law, it must be confined to its unusual context: where a court simultaneously imposed a fine and imprisonment for a crime that allowed only either penalty. To export *Bradley* into other contexts would be inconsistent with this Court's later opinions regarding the multiple-punishment component of the Double Jeopardy Clause.

Moreover, the technical rule of *Bradley* makes no sense when applied to multiple prison terms. If respondent had been directed to serve his life sentence first, or concurrently with his attempted-robbery sentence, he would have no plausible claim based on *Bradley*. He would simply have to serve the authorized term of life imprisonment that the sentencing judge imposed. Thus, *In re Bradley* should be limited to its special circumstances and not be used to release respondent from prison years before the trial court and the Missouri legislature intended.

ARGUMENT

THE DOUBLE JEOPARDY CLAUSE IS NOT VIOLATED WHEN AN UNAUTHORIZED MULTIPLE PRISON SENTENCE IS REDUCED TO A LAWFUL PRISON SENTENCE EVEN THOUGH THE DEFENDANT HAS ALREADY COMPLETED A VALID COMPONENT OF THE MULTIPLE SENTENCE

1. Respondent was tried once for his crime and convicted. He has not again been prosecuted for that crime. Accordingly, this case does not present any of the principal concerns of the Double Jeopardy Clause—*i.e.*, the "embarrassment, anxiety, and expense" of multiple trials and the concomitant increase in the "risk of an erroneous conviction." *Ohio* v. *Johnson*, 467 U.S. 493, 499 (1984). Instead, this case raises the issue whether the Missouri courts violated the Double Jeopardy Clause's prohibition "against multiple punishments for the same offense." *North Carolina* v. *Pearce*, 395 U.S. 711, 717 (1969).

a. In *Ohio* v. *Johnson, supra*, this Court noted that the constitutional prohibition against multiple punishments "is designed to ensure that the sentencing discretion of courts is confined to the limits established by the legislature" (467 U.S. at 499). Accordingly, in *Missouri* v. *Hunter*, 459 U.S. 359, 366 (1983), the Court ruled that "[w]ith respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended." See also *Garrett* v. *United States*, 471 U.S. 773, 793 (1985); *Whalen* v. *United States*, 445 U.S. 684, 689 (1980).

Respondent was convicted after one trial of felony murder and attempted robbery. The trial court sentenced him to a prison term greater than life imprisonment. The Missouri courts later held, however, that the Missouri legislature intended to limit the punishment of respondent to the penalty for felony murder—*i.e.*, life imprisonment. Following the command of the Double Jeopardy Clause, the trial court then vacated respondent's attempted robbery conviction and reduced respondent's sentence to life imprisonment, the sentence that had been imposed on the felony murder count. Thus, respondent has not and will not receive "greater punishment than the legislature intended." *Missouri* v. *Hunter*, 459 U.S. at 366. The multiple-sentence component of the Double Jeopardy Clause "does no more." *Ibid.*

b. Respondent contends (Br. in Opp. 11-18) that, contrary to this Court's statement in *Missouri* v. *Hunter,* the Double Jeopardy Clause establishes another rule for multiple sentences. He argues that the Clause also means that, because he initially received unauthorized multiple sentences, he must be released since he has served one of the two sentences, even though it is the shorter one.

Respondent's proposal does not follow from any interest protected by the Double Jeopardy Clause. The trial court lawfully sentenced respondent to life imprisonment for felony murder, and respondent will not be punished any more than that sentence requires. The only error in the original sentence—the imposition of two sentences rather than one—was corrected by the order of the state court vacating the 15-year sentence for attempted robbery. Because respondent has been given full credit on his life sentence for the time he served under the 15-year sentence, the vacated 15-year sentence will not have any effect on the date of respondent's release from his life sentence. See Pet. App. A70-A71.

The state court order vacating respondent's 15-year sentence fully protected the interest underlying the prohibition against multiple punishments: that a defendant should not be exposed to two penalties for a single offense. The sentencing judge believed that respondent should be subject to a total penalty of life plus 15 years' imprisonment. The state courts concluded that the state legislature did not intend to permit the penalty for conduct such as respondent's to exceed life imprisonment. It is therefore consistent with the Double Jeopardy Clause to require respondent to serve the term of life imprisonment, which both the sentencing court and the state legislature believed was an appropriate penalty for respondent's criminal conduct.

2. Respondent relies on this Court's decisions in *Ex parte Lange*, 85 U.S. (18 Wall.), 163 (1873), and *In re Bradley*, 318 U.S. 50 (1943), as support for his proposed rule governing multiple sentences. *Ex parte Lange* does not support respondent. The decision in *In re Bradley*, however, does provide him some support. Nevertheless, as we explain below, the decision in *In re Bradley* lacked any support in precedent at the time it was decided and is inconsistent with the Court's more recent double jeopardy cases. The double jeopardy analysis of *In re Bradley*, therefore, should not be extended to the context of this case.

a. The defendant in *Ex parte Lange* was convicted of a crime that could be punished by a $200 fine or a one-year prison term but not both. See 85 U.S. at 164. The trial court, however, sentenced Lange to both the maximum fine and a one-year prison term. Lange paid the fine and then sought a writ of habeas corpus. This Court ordered Lange to be released. *Id.* at 178. The Court noted that the money Lange used to pay his fine had "passed into the Treasury of the United States" and could not be returned. *Id.* at 175. Thus, the Court reasoned that any further punishment of Lange would be "in excess of the authority of the court." *Ibid.* When Lange paid his fine, the Court stated, "the power of the court to punish further was gone." *Id.* at 176. Accordingly, *Ex parte Lange* stands for the proposition, reiterated in such cases as *Ohio* v. *Johnson* and *Missouri* v. *Hunter*, that the Double Jeopardy Clause forbids "greater punishment than the legislature intended." *Missouri* v. *Hunter*, 459 U.S. at 366.

That reading of *Ex parte Lange* is supported by this Court's later cases. For example, in *North Carolina* v. *Pearce*, 395 U.S. 711 (1969), the Court cited *Ex parte Lange* for the proposition that the Double Jeopardy

Clause requires a State to credit a defendant with time served on a conviction if that conviction is reversed on appeal and the defendant is retried and again convicted. The Court explained (*id.* at 717-718) that, without such a credit, the defendant's ultimate punishment might run afoul of the principle of *Ex parte Lange* that a criminal sentence may not exceed the punishment authorized by the legislature. Similarly, in *United States* v. *DiFrancesco*, 449 U.S. 117, 139 (1980), the Court stated that "*Ex parte Lange* demonstrates [that] a defendant may not receive a greater sentence than the legislature has authorized." Accordingly, neither the holding of *Ex parte Lange* nor this Court's interpretations of that case support respondent's claim that *Lange* established a rule that a defendant must be released from custody if he completes one component of an unauthorized, multiple-component sentence.

b. The defendant in *In re Bradley* was found guilty of contempt and sentenced to six months' imprisonment and a $500 fine even though the statute only allowed a fine *or* imprisonment. See 318 U.S. at 51. Bradley paid the fine. The trial court then learned that the sentence was erroneous. The court therefore amended the sentence to delete the fine and ordered the clerk to return Bradley's money. *Id.* at 52. Relying exclusively on *Ex parte Lange*, this Court held that Bradley could not be imprisoned. The Court stated: "Since one valid alternative provision of the original sentence has been satisfied, the petitioner is entitled to be freed of further restraint." *Ibid.*

The rule in *Bradley* is a highly technical one. In light of the fact that the fine was promptly returned to Bradley, it is difficult to square the decision in that case with this Court's more recent decisions holding that the double jeopardy bar against multiple punishments is offended only if the court imposes a sentence greater than the legislature intended. Indeed, it would appear that in light

of the Court's more recent approach to the multiple punishment issue, the decision in *Bradley* is supportable only if the Court believed that Bradley was punished by paying the fine even though his money was promptly returned to him. If his payment of the fine constituted punishment in that fashion, then any additional prison term would have exceeded the court's statutory authority. If *Bradley* is read in that way, then it simply stands for the same proposition as *Missouri* v. *Hunter*—that the Double Jeopardy Clause forbids greater punishment than is authorized by the legislature.

If *Bradley* is to remain good law at all, it should be confined to its unusual context: where a court has simultaneously imposed a fine and imprisonment for a crime for which the legislature has authorized only one of those alternative penalties, but not both. It should not be applied where a court has imposed two terms of imprisonment for what the court considers separate offenses, and it is later held that only one offense was involved and thus only one term of imprisonment was authorized.[3]

Because a fine and imprisonment are penalties of different character, it often will not be clear which penalty the sentencing court would have selected if it had known that it could impose only one. There may be some justification, therefore, to hold that if the defendant has paid his fine, a court should not later be forced to decide that the sentencing court would have preferred to have

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[3] Multiple sentences for what is ultimately held to be a single offense can arise in one of two ways. The court can impose separate sentences for separate statutory violations that are ultimately held to constitute only a single offense, as in this case. Or the court can impose separate sentences for multiple alleged violations of a single statute, and those multiple alleged violations can later be held to constitute only a single unit of prosecution, supporting only a single sentence.

the defendant serve his term of imprisonment rather than pay a fine.[4] Where the sentencing court has imposed two consecutive terms of imprisonment, however, it is clear that the sentencing court would have intended the defendant to serve at least the longer of the two terms. Where the intention of the sentencing court is so clear, it does not make sense to give the defendant the windfall of a further reduction in his sentence simply because the sentencing court happened to have structured the sentences by having the defendant serve the shorter one first, and simply because the defendant has completed the shorter sentence before obtaining relief from the judgment against him. To uphold a double jeopardy claim in that context would be at war with this Court's observation in *Bozza* v. *United States*, 330 U.S. 160, 166-167 (1947), that "[t]he Constitution does not require that sentencing should be a game in which a wrong move by the judge means immunity for the prisoner."

The technical rule applied in *In re Bradley* can lead to nonsensical results if applied in contexts such as the one in this case. For example, there is no indication that the trial judge in this case thought that the sequence of respondent's original sentence (15 years' imprisonment to be followed by a term of life imprisonment) was in any way important.[5] If respondent had been directed to serve the life sentence first, he would have been serving that sentence when the trial court corrected his sentence. In that case, respondent would have had no plausible claim based on *Bradley*.

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[4] Obviously, once a defendant has served a sentence of imprisonment, a court cannot decide that it would prefer that he pay a fine instead, and then select the fine as the proper penalty.

[5] The court probably directed the attempted robbery sentence to be served first because attempted robbery was charged in Count 1 of the charging instrument. See Br. in Opp. 23.

The irrationality that would be produced by applying *Bradley* to a case involving consecutive prison sentences is underscored even more by noting what would have happened in this case if the sentencing court had imposed concurrent rather than consecutive sentences on the two counts on which respondent was convicted. Suppose the court had regarded respondent as less culpable and had imposed concurrent sentences of 15 years' and life imprisonment, rather than making the two sentences consecutive. Suppose further that respondent's 15-year sentence had been vacated after having been commuted, just as in this case. In that event, respondent would have to serve the remainder of his life sentence, since even the Eighth Circuit has held that when a court vacates one of two sentences, it is not required to vacate the longer sentence simply because the defendant has completed serving the shorter one. *Hardy* v. *United States*, 292 F.2d 192, 194-195 (8th Cir. 1961); see also *United States* v. *Leather*, 271 F.2d 80 (7th Cir. 1959), cert. denied, 363 U.S. 831 (1960). Ironically, then, if *Bradley* is applied in this context, respondent will be substantially better off by having received consecutive sentences than he would have been if the sentences had been concurrent.

A further anomaly that would flow from applying *Bradley* to a case involving multiple sentences of imprisonment is that everything turns on whether the defendant has completed his first sentence or not. Thus, if the state court had vacated respondent's 15-year sentence the day before the Governor's commutation order became effective, the court apparently would have been free, even under *Bradley*, to require that respondent complete his life sentence on the felony murder count. Under the court of appeals' reasoning, however, a delay in the state court's disposition until the day after the commutation order became effective would bar the state court from adjusting

respondent's sentence to accord with the clear intention of the sentencing court.

Nothing in the constitutional underpinnings of *In re Bradley* requires that the criminal justice system endure such anomalous results. The decision in *Bradley* was based exclusively on *Ex parte Lange*. But as we explained above, *Ex parte Lange* held only that a defendant may not be punished more severely than authorized by the legislature. Accordingly, *In re Bradley* lacked direct support in precedent. Nor was the holding in *Bradley* necessary in order to uphold the policies underlying the ban on multiple punishment that has been recognized as a component of the Double Jeopardy Clause. Thus, if the Court does not choose to overrule it altogether, it should limit *In re Bradley* to its special circumstances and not apply to it to release respondent from prison years before the trial court and the Missouri legislature intended.

Subsequent decisions of this Court regarding the role of the Double Jeopardy Clause in governing sentencing matters do not justify the broad reading that the court of appeals gave to *In re Bradley*. In *Bozza* v. *United, States, supra*, for example, the defendant was convicted of a crime that carried a mandatory sentence of a fine and imprisonment. 330 U.S. at 165-166. The trial court initially sentenced the defendant to imprisonment only. The court soon learned of its error and resentenced the defendant by adding a fine to his punishment. *Ibid.* This Court rejected the defendant's claim that the court violated the Double Jeopardy Clause by correcting the sentence, even though the result was to increase the sentence that the Court had initially imposed.

In *United States* v. *DiFrancesco*, 449 U.S. 117 (1981), the Court relied on *Bozza* for the proposition "that a sentence does not have the qualities of constitutional finality that attend an acquittal." *Id.* at 134. The Court in

DiFrancesco then stated that "[t]he Double Jeopardy Clause does not provide the defendant with the right to know at any specific moment in time what the exact limit of his punishment will turn out to be." *Id.* at 137. Accordingly, the Court held in *DiFrancesco* that the Double Jeopardy Clause does not bar the government from asking an appellate court to increase a sentence set by a trial court even if the defendant has already started to serve that sentence. *Id.* at 138. See also *Pennsylvania* v. *Goldhammer*, 474 U.S. 28 (1985).

It is therefore settled that the Double Jeopardy Clause does not prevent a sentence from being increased if the resultant sentence is one authorized by the legislature. That is true even where the defendant has begun serving his sentence. And there is no discernible constitutional principle that would require a different result if the defendant has not only begun serving his sentence, but has completed serving some discrete component of it. Thus, a broad reading of the holding of *In re Bradley*—that a multiple sentence may not be reduced if a valid component has been served—is inconsistent with the Court's current view of double jeopardy principles.

In *United States* v. *Benz*, 282 U.S. 304 (1931), the court held that a trial court may reduce a sentence that is already being served. The Court in *Benz* then stated in dictum that a court may not increase a sentence once it is imposed. The Court cited *Ex parte Lange* for that dictum. *Id.* at 307. Fifty years later, in *United States* v. *DiFrancesco, supra,* the Court reexamined *Benz* and found that its reliance on *Ex parte Lange* was misplaced. See 449 U.S. at 138-139. Hence, the Court "confine[d] the dictum in *Benz* to *Lange*'s specific context." *Id.* at 139. *In re Bradley*, which similarly relied on an unduly broad reading of *Lange* for its support, should likewise be limited to its specific context. It should not be generalized to create a rule of double

jeopardy that allows a defendant such as respondent to go free years before the trial court and the legislature intended. If the judgment in this case is affirmed, respondent will have served only eight years' imprisonment for conduct to which the legislature assigned a penalty of life imprisonment, and for which the sentencing court intended respondent to serve a life term plus 15 years. The fact that the sentencing court could validly elect to impose only one of those sentences does not justify the conclusion that respondent must be released because he has served the shorter of the two.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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AMICUS CURIAE

BRIEF

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No. 88-420

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

JIMMY JONES,

Petitioner,

vs.

LARRY P. THOMAS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF AMICUS CURIAE OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

JIMMY JONES,

Petitioner,

vs.

LARRY P. THOMAS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

MOTION OF AMICUS CURIAE FOR LEAVE TO FILE BRIEF IN SUPPORT OF PETITIONER

Pursuant to Supreme Court Rule 36.3, the Criminal Justice Legal Foundation respectfully moves for leave to file the accompanying brief amicus curiae in support of petitioners in the above captioned case. Counsel for petitioner has consented in writing, but counsel for respondent has refused consent.

In the accompanying brief, amicus argues that this Court should continue the process begun in *Stone* v. *Powell*, 428 U.S. 465 (1967) of limiting the relitigation de novo on habeas corpus of questions already fully and fairly considered in the state courts. Specifically, amicus argues that the doctrine of the law of the case should apply to situations covered by neither *Stone* nor *Rose* v. *Mitchell*, 443 U.S. 545 (1979).

The Criminal Justice Legal Foundation (CJLF) is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest.

CJLF seeks to bring the due process protection of the accused into balance with the rights of the victim and of society to rapid, efficient and reliable determination of guilt and swift execution of punishment.

The present case involves the relitigation of a question fully and fairly litigated in the state courts with proper respect for this Court's precedents and for the constitutional rights of the respondent. Such unnecessary relitigation is contrary to the rights of victims and society which CJLF was formed to advance.

For the foregoing reasons amicus requests leave to file its brief.

Dated: February, 1989

Respectfully submitted,

KENT S. SCHEIDEGGER

Attorney for Amicus Curiae
Criminal Justice Legal Foundation

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BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONER

SUMMARY OF FACTS AND CASE

In 1972, respondent Larry P. Thomas murdered an innocent customer during an attempted armed robbery of an auto parts store. He was sentenced to consecutive terms of 15 years for the robbery and life for the murder. Subsequently, the state supreme court decided that the state legislature had not intended for felony murderers to suffer both punishments. Through state remedies, Thomas's sentence was reduced to a single life term with credit for the time served on the robbery sentence. *Thomas* v. *State*, 665 S.W.2d 621 (Mo. App. 1983).

The United States Court of Appeals for the Eighth Circuit has decided that Thomas, having been punished for the attempted robbery, must now escape scot-free from punishment for the murder. *Thomas* v. *Morris*, 844 F.2d 1337 (1988). The federal

court has ordered this result based on a simple disagreement with the carefully considered decision of a state appellate court on a previously unresolved question of federal law.[1]

SUMMARY OF ARGUMENT

The miscarriage of justice wrought by the Court of Appeals in this case calls into question the wisdom of the de novo review of all federal constitutional questions on federal habeas corpus authorized by this Court in *Brown* v. *Allen*, 344 U.S. 443 (1953). Amicus curiae Criminal Justice Legal Foundation respectfully submits that the time has come to reconsider and modify the *Brown* rule.

This Court has modified the rule of *Brown* v. *Allen* before and has the authority to do so again. The changes in the law and the country since *Brown* warrant reconsideration. The competing concerns involved in federal habeas call for a middle ground of deference to state rulings between the extremes of de novo review and res judicata preclusion. A rule is needed that is a "heavy deterrent to vacillation on arguable issues, but not designed to prevent the correction of plain error or injustice." 1B J. Moore, J. Lucas & T. Currier, *Moore's Federal Practice* ¶ 0.404[1] at 124 (2nd ed. 1988) (cited below as "Moore's.") The doctrine of the law of the case provides that middle ground.[2]

1 This very brief summary reflects only the facts necessary to frame the issues in this brief. For a more complete statement, amicus adopts the statement in petitioner's brief.

2 Although taking a different approach than petitioner, this argument addresses the question as presented in the petition for certiorari: the effect of the disagreement between the state and federal courts.

ARGUMENT

I. This Court has the authority to reconsider and modify the rule of *Brown* v. *Allen*.

Some of the advocates of the rule of de novo review would have us believe that the rule is both mandated by the Constitution, see, e.g., Bamberger, *Habeas Corpus is a Constitutional Right*, 71 A.B.A. J., June, 1985, at 34, 38, and legislated by Congress, see, e.g., Peller, *In Defense of Federal Habeas Corpus Relitigation*, 16 Harv. C.R.—C.L. L. Rev. 579, 618 (1982) (cited below as "Peller.") Neither is true.

It is often said that res judicata did not apply to habeas corpus at common law. See Reitz, *Federal Habeas Corpus: Impact of an Abortive State Proceeding*, 74 Harv. L. Rev. 1315, 1327, n. 45 (1961). That statement is true only to the extent that one denial of habeas did not preclude a subsequent grant. See W. Duker, *A Constitutional History of Habeas Corpus*, 5-6 (1980). The habeas court could not, however, ignore the adjudication of guilt of a crime by a court of competent jurisdiction. 3 W. Blackstone, *Commentaries* 132 (1768). It was held in *Bushell's Case*, 124 Eng. Rep. 1006 (1670) that a person imprisoned for contempt by a competent court could be freed on habeas when his undisputed conduct was not, as a matter of law, punishable.[3] That is a very different matter from releasing a person convicted by a competent court for conduct which is unquestionably felonious. See also Oaks, *Legal History in the High Court—Habeas Corpus*, 64 Mich. L. Rev. 451, 461-68 (1966).

The common law writ of habeas corpus was brought to America and guaranteed in the Suspension Clause, U.S. Const.

3 Bushell was a juror held in contempt for bringing in the "wrong" verdict.

art. I, § 9, cl. 2. Chief Justice Marshall made it clear early in our history that the writ thus guaranteed was no broader in scope than the English writ. *Ex Parte Watkins*, 28 U.S. (3 Pet.) 193, 201-202 (1830); see also *McNally* v. *Hill*, 293 U.S. 131, 136 (1934).

In *Watkins*, a convicted prisoner was denied a writ of habeas corpus by the Supreme Court. Some have contended that this decision is based on the particular limits of the original jurisdiction of the Supreme Court. See *Fay* v. *Noia*, 372 U.S. 391, 407 (1963); Peller, *supra* p. 3, at 610-12. Although there is some language discussing the limits of the court's individual jurisdiction, 28 U.S. at 203, the bulk of the opinion deals with the writ itself and the respect accorded prior adjudications. "If this judgment be obligatory, *no* court can look behind it." *Id.* at 203 (italics added). The final holding is unmistakably clear. "[W]e are unanimously of opinion that the judgment of a court of general criminal jurisdiction justifies his imprisonment, and that the writ of *habeas corpus* ought not to be awarded." *Id.* at 209. The common law rule as stated by Blackstone was intact in the United States as of 1830.

The Judiciary Act of 1789 had specifically excluded from federal habeas all prisoners in state jails, except when needed to testify. Ch. 20, § 14, 1 Stat. 73, 82. This limitation remained, with exceptions for operation of the federal government, Force Bill, ch. 57, § 7, 4 Stat. 632, 634-35 (1833), and foreign relations, Act of Aug. 29, 1942, ch. 257, 5 Stat. 539, and until after the Civil War.

In 1867, the limitation was removed and jurisdiction was extended to state prisoners held in violation of the "constitution, or any treaty or law of the United States." Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385, 386. The legislative history of this measure has been furiously and voluminously debated. See Bator, *Finality in the Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441, 474-77 (1963) (cited

below as "Bator"); *Fay* v. *Noia*, *supra*, 372 U.S. at 415-18; *id.* at 452-53 (Harlan, J., dissenting); Peller, *supra* p. 3, at 618-20.

Amicus will not add to this debate except to add one observation. If Congress had intended to change the nature of the writ itself and overrule the principles stated in Blackstone and *Watkins*, as opposed to merely extending federal jurisdiction into an area formerly served only by state habeas, it seems very strange that it did not say so explicitly, particularly in light of the fact that section 2 of the very same act provided for an adequate remedy by writ of error to this Court upon a denial of a federal claim. 14 Stat. at 386-87.

From the passage of the 1867 Act until *Brown* v. *Allen* this court generally adhered to the idea that only jurisdictional issues would be considered on habeas. *In re Belt*, 159 U.S. 95 (1895) (jury waiver); *Matter of Moran*, 203 U.S. 96, 105 (1906) (self-incrimination).[4] While there is broad dictum anticipating the *Brown* rule in *Nielsen, Petitioner*, 131 U.S. 176, 184-85 (1889), that approach was not followed in later cases such as *Belt* and *Moran*. The "jurisdictional" analysis was sometimes strained, as in *Ex parte Siebold*, 100 U.S. 371 (1879), holding the constitutionality of the statute defining the crime to be a jurisdictional issue, but the limitation was recognized nonetheless.

In *Frank* v. *Mangum*, 237 U.S. 309 (1915), this Court first squarely confronted the effect of a prior state appellate court ruling on a question presented on habeas. Frank maintained that

4 Peller's attempt to distinguish *Moran* serves only to demonstrate his ignorance of elementary constitutional law. Compare Peller, *supra* p. 3, at 615, n. 194 (claiming that the Bill of Rights did not apply in the Oklahoma Territory in 1906) with *Thompson* v. *Utah*, 170 U.S. 343, 347 (1898) (applying Bill of Rights in a territory); cf. *Dorr* v. *United States*, 195 U.S. 138, 142-43 (1904) (Bill of Rights inapplicable in outlying territory not incorporated into the United States).

his trial had been dominated by a mob, but the state supreme court on direct appeal had decided after careful consideration that the trial had not been mob-dominated. *Frank* v. *State*, 141 Ga. 243, 280 (1914).

This Court, on appeal from the denial of federal habeas, declined to decide whether res judicata applied to this situation. *Frank* v. *Mangum*, *supra*, 237 U.S. at 334. The Court held instead that the state decision "must be taken as setting forth the truth of the matter, certainly until some reasonable ground is shown for an inference that the court which rendered it either was wanting in jurisdiction, or at least erred in the exercise of its jurisdiction...." *Ibid.*

The Court noted the argument raised by Justice Holmes in dissent that "if in fact there was disorder such as to cause a loss of jurisdiction in the trial court, jurisdiction could not be restored by any decision of the [state] Supreme Court," *id.* at 336, but held that this argument "begs the question of the existence of such disorder . . . which should not be assumed, in the face of the decision of the reviewing court, without showing some adequate ground for disregarding that decision." *Ibid.* While it has been said that this holding was rejected in *Moore* v. *Dempsey*, 261 U.S. 86 (1923), see *Fay* v. *Noia*, *supra*, 372 U.S. at 421, the *Frank* rule has been substantially codified as to factual determinations in 28 U.S.C. § 2254(d). While this rule does not apply to mixed questions of law and fact, *Strickland* v. *Washington*, 466 U.S. 668, 684 (1984), it does apply to historical facts underlying such questions, *Sumner* v. *Mata*, 455 U.S. 591, 597 (1982). The *Frank* state court determination that only two minor incidents "occurred within the hearing or knowledge of the jury," 237 U.S. at 313, would be entitled to deference under section 2254(d) today.

The res judicata question avoided in *Frank* was addressed in *Brown* v. *Allen*, 344 U.S. 443 (1953). After reaffirming that state court determinations of independent state grounds and disputed factual questions would be respected, the Court said "In other

circumstances the state adjudication carries the weight that federal practice gives to the conclusion of a court of last resort of another jurisdiction on federal constitutional issues. It is not *res judicata*." *Id.* at 458 (footnote omitted). Thus, the *Brown* court decided that the state adjudication would be a precedent under the doctrine of stare decisis, for whatever it was worth, but would not be res judicata. The doctrine of the law of the case is an intermediate between stare decisis and res judicata. 1B Moore's, *supra* p. 2, ¶ 0.404[1], 117, n. 2. This doctrine was not considered in *Brown*.

In *Stone* v. *Powell*, 428 U.S. 465 (1976), this Court modified the *Brown* rule for exclusionary rule questions arising under *Mapp* v. *Ohio*, 367 U.S. 643 (1961). While rejecting the *Brown* rule of de novo relitigation, *Stone* did not return all the way to the common law res judicata rule of *Ex parte Watkins*, 28 U.S. (3 Pet.) 193 (1830). Within the context of the exclusionary rule, the competing interests of finality, justice, and enforcement of the Constitution were best served by restricting the initial federal review to a determination of whether the state hearing had been full and fair. If it had been, that ended the inquiry. The opinion dealt primarily with the policies underlying the exclusionary rule.

In *Rose* v. *Mitchell*, 443 U.S. 545 (1979), this Court declined to extend *Stone* to an equal protection claim of racial discrimination in the selection of a grand jury foreman. The Court emphasized the special nature of racial discrimination claims and the exceptional need for strict federal scrutiny in this area. *Id.* at 558.

The question of whether different degrees of deference to the state court decision may be used for different types of federal questions was presented to Congress when it considered the rules promulgated by this Court for habeas corpus cases. The House committee noted that Congress had been urged by some to abrogate *Stone* v. *Powell*, *supra*, and the committee decided not

to decide. H.R. Rep. No. 1471, 94th Cong. *reprinted in* 1976 U.S. Code Cong. & Ad. News 2478, 2479.

This history demonstrates that the question of whether this Court should modify *Brown* v. *Allen* is one of policy and not one of power. The rule of de novo review was created by this Court and not by the Congress. This Court has modified the rule before, and it can do so again to meet the changing needs of a changing nation.

II. Changes in the law and the nation since *Brown* v. *Allen* call for reconsideration.

A. The Scope of "Constitutional" Claims.

At the time *Brown* v. *Allen*, 344 U.S. 443 was decided in 1953, there were few federal constitutional restrictions on state criminal procedure. The ex post facto and bill of attainder restrictions of the original Constitution rarely arose. The due process clause of the Fourteenth Amendment incorporated only those specific guarantees which were deemed "of the very essence of a scheme of ordered liberty." *Palko* v. *Connecticut*, 302 U.S. 319, 325(1937), overruled in *Benton* v. *Maryland*, 395 U.S. 784, 796 (1969). Habeas petitions attacking procedural matters were thus generally limited to claims of racial discrimination, e.g., *Brown*, *supra*, 344 U.S. at 464-74 (jury selection) and claims of violations so egregious as to render the entire proceeding a sham, see *Frank* v. *Mangum*, 237 U.S. 309 (1915) (mob domination); *Moore* v. *Dempsey*, 261 U.S. 86 (1923) (same); *Brown*, *supra*, 344 U.S. at 474-75 (allegedly coerced confession).

The scope of "constitutional" claims today is vastly broader. A defendant with a constitutional claim is not necessarily contending that he has been denied fundamental fairness. More often that not, he is simply contending that the trial court failed to comply with a detailed code of criminal procedure promulgated through the decisions of this Court. Friendly, *Is Innocence*

Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142, 155-56 (1970). Many of these rules are far from fundamental. *Id.* at 156-57. The exclusionary rule of *Mapp* v. *Ohio*, 367 U.S. 643 (1961), is an extreme case, serving a purely external purpose and actually detracting from the fairness and accuracy of the trial. See *Stone* v. *Powell*, 428 U.S. 465, 490 (1976).

The "no comment" rule of *Griffin* v. *California*, 380 U.S. 609 (1965) is a prime example of a rule on the fringe. Nothing can be more obvious to a jury than the defendant's failure to take the stand and contradict the evidence against him. Whether comment on that failure is fair is a question on which reasonable people can and do differ.[5] This Court decided in *Chapman* v. *California*, 386 U.S. 18 (1967) that "*Griffin* error" was subject to harmless error analysis. Such an error was found to be harmless beyond a reasonable doubt in *United States* v. *Hasting*, 461 U.S. 499 (1983).

If a given type of error is so far removed from the fundamental fairness of a trial that it may be harmless beyond a reasonable doubt, should that type of error be subject to relitigation de novo on habeas? That question did not exist for "due process" errors at the time of *Brown*,[6] because only fundamentally unfair procedures constituted due process violations. "*Griffin* error" is a far cry from thumbscrew confessions and lynch mob trials. So are many other irregularities which are today deemed constitutional issues. See, e.g., *Faretta* v. *California*, 422 U.S. 806 (1975) (right

5 The comment in *Griffin* was expressly authorized by the state constitution. Cal. Const. art. I, former § 13, repealed 1974, quoted in part in *Griffin*, *supra*, 380 U.S. at 610, n. 2.

6 Equal protection questions deserve separate consideration and will be discussed in part IV. D., below.

not to have counsel); *Ballew* v. *Georgia*, 435 U.S. 223 (1978) (five member jury is unconstitutional while six is not); *Taylor* v. *Louisiana*, 419 U.S. 522 (1975) (exclusion of women jurors in trial of man). The competing interests need to be reweighed.

B. The Availability of Counsel.

A second and fundamental difference between state courts today and those of thirty-six years ago is the availability of counsel. A felony defendant today has the benefit of counsel both at trial, *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), and on the first appeal. *Douglas* v. *California*, 372 U.S. 353 (1963). Before a defendant ever reaches federal habeas corpus, he has had his case argued by counsel not once but at least twice. The reliability of the state courts in ruling on the federal questions is thus substantially enhanced.

C. Acceptance of Federal Authority in the States.

The rule of *Brown* v. *Allen* is part of the long struggle to establish the supremacy of federal law. From the Nullification Acts, to the Civil War, to the Little Rock school incident, to George Wallace's infamous stand in the schoolhouse door, federal authority has been bitterly resisted. Unquestionably, at the time of *Brown* v. *Allen* there were many state courts that could not be trusted. Does the same hold true today?

More progress has been made toward acceptance of federal authority in the last twenty years than in the previous hundred. Is it conceivable that in 1989 a judge of a state court of general jurisdiction would answer a federal constitutional objection by saying "that the 'case [was] not being tried under the Federal Constitution'"? See *Estes* v. *Texas*, 381 U.S. 532, 556 (1965) (Warren, C. J., concurring). Would the governor of a state today call out the militia to block a federal desegregation order, forcing the President to call in the Army? See *Cooper* v. *Aaron*, 358 U.S. 1, 9-12 (1958). Would a governor personally stand in the way of

the enforcement of a federal court order? See L. Sobel, *Civil Rights 1960-1966* at 217-18 (1967).

These occurrences of twenty and thirty years ago are inconceivable today. The supremacy of federal law is universally acknowledged and is routinely applied in the state courts. The differences today are differences of interpretation, not obstinate resistance.

III. The competing considerations in federal habeas corpus call for a middle ground of respect for the state court decision.

A. Enforcement of this Court's Precedents.

During the past thirty years, this Court has decided a vast number of cases dealing with nearly every aspect of criminal procedure. One might fairly say that in the law of criminal procedure today the precedents of this Court are now more pervasive than the procedural rules of the state. The law school course in criminal procedure typically consists entirely of the study of this Court's precedents. See generally P. Lewis, *Criminal Procedure: The Supreme Court's View—Cases* (1979) (a typical case book).

As a matter of law, this Court's precedents "control" state court rulings on federal questions. *Chesapeake & O. Ry. v. Martin*, 283 U.S. 209, 220-21 (1931). As a matter of practice, though, control ultimately depends on a mechanism of correction when lower courts stray. In an earlier day, appeal to this Court by the aggrieved party was an adequate remedy. Prior to the "Judge's Bill" in 1925, ch. 229, 43 Stat. 936, 937-38, such an appeal was available as a matter of right to a litigant who claimed he had been denied a federal constitutional right in state court. See E. Surrency, *History of the Federal Courts* 251-52 (1987).

In today's world, however, it is not humanly possible for this Court to effectively perform an error-correcting function in supervision of fifty state judicial systems, on top of its already heavy and important workload. See *Olden* v. *Kentucky*, 109 S.Ct. 480, 484, 102 L.Ed.2d 512, 521 (1988) (Marshall, J., dissenting); *Pennsylvania* v. *Bruder*, 109 S.Ct. 205, 207, 102 L.Ed.2d 172, 178 (1988) (Stevens, J., dissenting); *Boag* v. *MacDougall*, 454 U.S. 364, 366 (1982) (O'Connor, J., concurring); *id.* at 368 (Rehnquist, J., dissenting, quoting Vinson, C. J.). Hence there is a need for collateral review. "The primary justification given by the Court for extending the scope of habeas to all alleged constitutional errors is that it provides a quasi-appellate review function, forcing trial and appellate courts in both the state and federal system to toe the constitutional mark." *Mackey* v. *United States*, 401 U.S. 667, 687 (1971) (Harlan, J., concurring in the judgments) (citation omitted); see also *Rose* v. *Mitchell*, 443 U.S. 545, 563 (1979).

Because this Court is incapable of reviewing the vast number of state decisions rendered on federal constitutional questions, the district courts and courts of appeals must be called out as a sort of judicial posse comitatus to ensure that this Court's precedents are obeyed. See *Brown* v. *Allen*, 344 U.S. 443, 491-94 (1953) (Frankfurter, J., concurring); *Stone* v. *Powell*, 428 U.S. 465, 526 (1976) (Brennan, J., dissenting). Does it necessarily follow, though, that de novo review is necessary and that the state court's resolution of the question carry no weight at all? Does it follow that the district courts must have as free a hand on habeas as this Court would have on direct appeal? See *Stone* v. *Powell*, *supra*, 428 U.S. at 511-12 (Brennan, J. dissenting). Does it follow that a single federal district judge must have the power to nullify a carefully considered and quite possibly correct decision of a state supreme court *simply because he disagrees with it?* Amicus submits that it does not.

The need to ensure that this Court's precedents are respected weighs in the balance against giving completely preclusive effect

to the state court decision, but it does not mandate de novo review. A middle ground is needed.

B. State Courts and Federal Rights.

Supporters of de novo review frequently assert that a criminal defendant has a "right" to have his federal claim decided by a federal court. See, e.g., Reitz, *Federal Habeas Corpus*, 108 U. Pa. L. Rev. 461, 464 (1960). The contention is that state courts tend to be less protective of federal rights than federal courts. See, e.g., Peller, *supra* p. 3, at 666-67. This sweeping assertion requires a closer examination.

First, it is worth noting that many issues of federal rights are finally adjudicated in state courts. A civil defendant claiming a federal defense to a state cause of action cannot remove the action. *Franchise Tax Board* v. *Laborers Vacation Trust*, 463 U.S. 1, 10 (1983). The right of the interstate merchant to be free from discriminatory state taxation is certainly a vitally important federal right, with the vigor of our national economy depending on it. See *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263, 276 (1984). Yet Congress has banned injunctive relief for the protection of that right from the lower federal courts, 28 U.S.C. § 1341, and this Court has broadly construed that prohibition to relegate state tax matters to the state courts. See *California* .v *Grace Brethren Church*, 457 U.S. 393, 411 (1982).Even so, the right is alive and well and being enforced by the state courts. See, e.g., *Division of Alcoholic Beverages* v. *McKesson Corp.*, 524 So.2d 1000, 1009 (Fla. 1988), cert. granted 110 S.Ct. 389 (Nov. 14, 1988).

Second, some rights are more distinctly "federal" than others. The protection of interstate commerce and the right to travel interstate, *Crandall* v. *Nevada*, 73 U.S. 35 (1867), are uniquely federal. The right to equal protection of the laws appears in relatively few state constitutions,[7] and has historically depended on federal courts for its vindication, especially with regard to racial discrimination. *Rose* v. *Mitchell*, 443 U.S. 545, 562 (1979).

At the other end of the scale are those rights not listed in the Fourteenth Amendment or in Article I, section 10, and which are made applicable to the states only through the incorporation doctrine. The original Bill of Rights was widely copied throughout the states, and most of these rights are explicitly guaranteed in most state constitutions. In the present case, for example, respondent's *state* double jeopardy right is explicitly guaranteed in Missouri Constitution article I, section 19 and has been since 1875. The corresponding *federal* right is merely implicit in the Due Process Clause of the Fourteenth Amendment and was not recognized until a scant twenty years ago. *Benton* v. *Maryland*, 395 U.S. 784, 796 (1969) overruling *Palko* v. *Connecticut*, 302 U.S. 319 (1937).

The law of search and seizure also illustrates an "incorporated" right that is not peculiarly federal. While this Court has cut back on the scope of the exclusionary rule, many state courts have maintained a broader rule of exclusion under their independent state rules. See, e.g., *State* v. *Novembrino*, 519 A.2d 820, 857 (N.J.1987); *People* v. *Bigelow*, 488 N.E.2d 451, 458 (N.Y.1985); *Commonwealth* v. *Upton*, 476 N.E.2d 548, 556 (Mass.1985); *State* v. *White*, 640 P.2d 1061, 1070 (Wash.1982).

7 A Westlaw search of state constitutions for "equal protection" turned up only seven: Cal. Const. art. I, § 7; Conn. Const. art. I, § 20; Ill. Const. art. I, §§ 2, 18; La. Const. art. I, § 3; N.Y. Const. art. I, § 11; Ohio Const. art. I, § 2; S.D. Const. art. VI, § 26.

The assertion that federal rights should be litigated in federal court is thus more true for some rights than for others. In many cases, relitigation de novo on habeas does nothing more than give the defendant an opportunity to go judge-shopping. A final state court ruling favoring the defense is the end, but one favoring the prosecution is only the beginning. "Heads I win; tails we take it over."

C. The Need for Finality.

"Perpetual litigation of any issue ... delays, and therefore threatens to deny, justice." *Christianson* v. *Colt Industries Operating Corp.*, 108 S.Ct. 2166, 2177 n. 5, 100 L.Ed.2d 811, 830 (1988); see also Magna Carta, art. 40. This principle applies to criminal cases as well as civil. *Mackey* v. *United States*, 401 U.S. 667, 690-91 (1971) (Harlan, J., concurring in the judgments). It is particularly true in capital cases where justice is postponed and the victims' families are kept in agony while the issues are incessantly rehashed. See Parker, *2000 Cheer Execution of Killer Bundy*, Wash. Post, Jan. 25, 1989, at A6, col. 1. The need for finality is discussed eloquently by Justice Harlan in his *Mackey* opinion, *supra*, and by many others. See *Fay* v. *Noia*, 372 U.S. 391, 445 (1963) (Clark, J., dissenting); *Spencer* v. *Texas*, 385 U.S. 554, 583-84 (1967) (Warren, C. J., concurring and dissenting); Bator, *supra*, p. 4, at 444-53; Friendly, *supra* p. 8, at 146-51. Amicus will not dwell on it here, but only note that in every area of the law except constitutional criminal questions the finality of a judgment of a competent court is absolute. *Mackey*, *supra*, 401 U.S. at 683, n. 2 (Harlan, J., concurring in the judgments). If an absolute rule is not appropriate here, the same considerations that justify preclusion elsewhere, at least give great weight to the need for finality on habeas. Friendly, *supra* p. 8, at 149.

D. The Need for a Single Body of Law.

All courts, state and federal, are bound to follow the precedents established by this Court on federal questions. *Chesapeake*

& O. Ry. v. *Martin*, 283 U.S. 209, 220-21 (1931); *Mandel* v. *Bradley*, 432 U.S. 173, 176 (1977). When this Court has not spoken, however, the uniformity ends. Instead, we have a tug of war between two sets of courts, neither bound to follow the other.

Suppose, hypothetically, that a state supreme court resolves an issue one way, a federal court of appeals resolves it another way, and this Court denies certiorari. What happens when another defendant presents the same question? The state court judges are bound to follow the precedent established by their state supreme court. E.g., *Auto Equity Sales, Inc.* v. *Superior Court*, 57 Cal.2d 450, 455, 369 P.2d 937, 939-40 (1962) and are not required to follow the lower federal courts, 1B Moore's, *supra* p. 2, ¶ 0.402 [1] at 23. The federal district judge, on the other hand, is bound to follow the federal court of appeals. *Hasbrouck* v. *Texaco, Inc.*, 663 F.2d 930, 933 (9th Cir. 1981). The federal court must find that the prisoner is held "in violation of the Constitution of the United States" and order him released or retried even though the state court judges have faithfully and properly followed the precedent binding upon them.

This Court could resolve the conflicts and maintain order only by granting certiorari in every case where a federal court of appeals disagrees with a state supreme court. Such a burden would necessarily compete with the other vital demands on this Court's limited resources. See pp. 11-13, *supra*. A better method would be to limit the lower federal court's review to a determination of whether the state courts did, in fact, obey the precedents binding on them. In that way, a single body of law would govern federal questions in state criminal cases: the precedents of this court to the extent they reach, and the precedents of the state courts where this Court has not spoken.

E. Is Innocence Irrelevant?

Judge Henry Friendly asked this question in 1970. Friendly, *supra* p. 8. This Court's answer seems to be that the relevance

of innocence must be determined issue-by-issue. In *Stone* v. *Powell*, 428 U.S. 465 (1976), this Court considered whether exclusionary rule claims should be relitigated de novo on habeas. The negative answer was based in large part on the absence of any connection between innocence and the legality of the search. "[T]he physical evidence sought to be excluded is typically reliable and often the most probative information bearing on the guilt or innocence of the defendant.... Application of the rule thus deflects the truthfinding process and often frees the guilty." *Id.* at 490. Innocence *is* relevant in Fourth Amendment matters.

A different variation was presented in *Rose* v. *Mitchell*, 443 U.S. 545 (1979). Mitchell claimed that there had been racial discrimination in the selection of the foreman of the grand jury that had indicted him. This claim was irrelevant to his innocence; the subsequent conviction by the properly-selected trial jury necessarily established that the lesser degree of proof for indictment had been met. Justices Powell and Rehnquist would have extended the *Stone* rule to this situation. *Id.* at 579 (Powell, J., concurring in the judgment).

The majority disagreed, based on the special place of equal protection in the constitutional pantheon of rights and on the special need for federal scrutiny of racial discrimination claims. The Court emphasized the direct, rather than incorporated, nature of the equal protection injunction. "Indeed, whereas the Fourteenth Amendment by its terms always has been directly applicable to the States, the Fourth Amendment and its attendant exclusionary rule only recently have been applied to the States." *Id.* at 562.

The *Rose* court decided, in effect, that innocence is *not* relevant when the claim is that the state court itself has discriminated on the basis of race in violation of the Equal Protection Clause. A narrowly divided court reaffirmed *Rose* and granted habeas relief to a clearly guilty prisoner in *Vasquez* v. *Hillery*, 474 U.S. 254 (1986).

The relevance of innocence to the consideration of arguably barred claims was discussed in a pair of cases in 1986: *Kuhlmann* v. *Wilson*, 477 U.S. 436 and *Murray* v. *Carrier*, 477 U.S. 478. *Kuhlmann* involved a successive petition raising a ground resolved against the petitioner by the court of appeals on his first petition. 477 U.S. at 441. The majority denied the claim on the merits. *Id*. at 456. A plurality also decided that Judge Friendly's "colorable showing of factual innocence" test was a prerequisite for clearing the "ends of justice" hurdle of 28 U.S.C. § 2244(b). *Id*. at 454.

In *Murray* v. *Carrier*, this Court determined that the "cause and prejudice" test for procedurally defaulted claims applied to omissions on appeal and that the inadvertent failure of counsel to raise the issue on appeal was not adequate cause. 477 U.S. at 487-90. Recognizing that this rule could defeat the fundamental purpose of habeas corpus to rectify a truly unjust incarceration, the Court held "that in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default." *Id*. at 496.

Taking these cases together, it appears that innocence is relevant, but not controlling. It is relevant to exclude from habeas altogether an issue unrelated to the fairness of the determination of innocence where there is no compelling reason to believe that full and fair adjudication in the state courts is insufficient. *Stone* v. *Powell*, *supra*. It is relevant to the decision of whether to relieve a defendant of a procedural default. *Murray* v. *Carrier*, *supra*. Finally, a majority of the Justices agrees that innocence "constitutes a sufficient justification for returning to court a second time with the same claim." *Kuhlmann*, *supra*, 477 U.S. at 471 n. 5 (Brennan, J., dissenting); *id*. at 476 (Stevens, J., dissenting).

On the other hand, a lack of innocence is not sufficient to overcome the need for de novo federal habeas review in that one area of the law where America's long and bitter experience has shown that the intervention of federal courts is imperative: denial of equal protection on the basis of race. *Rose* v. *Mitchell*, *supra*.

IV. The doctrine of the law of the case provides the correct balance in most cases.

A. The Doctrine.

As noted earlier, *supra* pp. 6-7, *Brown* v. *Allen* held that the decision of a state court was not binding on the federal court as res judicata but did not discuss the related doctrine of the law of the case. Amicus submits that the aspect of the law of the case doctrine "regulating the respect that one judge or court owes the rulings of another judge or court in the same case or closely related cases," 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4478 at 788 (1981) (cited below as "Wright"), should apply to federal habeas.

The statement of the doctrine which is most often cited is that in *White* v. *Murtha*, 377 F.2d 428, 431-32 (5th Cir. 1967). The law of the case "must be followed in all subsequent proceedings in the same case in the trial court or on a later appeal in the appellate court, unless the evidence on a subsequent trial was substantially different, controlling authority has since made a contrary decision of the law applicable to such issues, or the decision was clearly erroneous and would work a manifest injustice." See *Arizona* v. *California*, 460 U.S. 605, 618, n. 8 (1983); 1B Moore's, *supra* p. 2, ¶ 0.404 [4.-6] 146-47; 18 Wright, *supra* p. 19, at 790, n. 5.

Unlike res judicata, law of the case is a rule of practice and not a limit on the power of the court. *Messenger* v. *Anderson*, 225 U.S. 436, 444 (1912); *Christianson* v. *Colt Industries Operating*

Corp., 108 S.Ct. 2166, 2178, 100 L.Ed.2d 811, 831 (1988). In this sense it is similar to the exhaustion doctrine of *Ex parte Royall*, 117 U.S. 241, 251-52 (1886), and the abstention doctrine of *Younger* v. *Harris*, 401 U.S. 37, 52-53 (1971). Even though federal courts had the power to interfere with the ongoing state proceedings in those cases, this Court decided that they should refrain from doing so. Similarly, the law of the case doctrine teaches that courts should refrain from reopening issues decided by a coordinate court, absent certain exceptional circumstances, even though the court has the power to do so.

In *Christianson* v. *Colt Industries Operating Corp.*, *supra*, this Court applied the doctrine of the law of the case to a decision of one court of appeals to transfer a case to another. This is the "coordinate court" situation. The *Christianson* court stated that the courts of appeals should adhere strictly to principles of the law of the case, 108 S.Ct. at 2179, 100 L.Ed.2d at 832, and noted that the doctrine precluded relitigation of close questions.

> "[C]lose questions, by definition, never have clearly correct answers. Under law-of-the-case principles, if the transferee court can find the transfer decision plausible, its jurisdictional inquiry is at an end. See *Fogel* v *Chestnutt*, 668 F2d 100, 109 (CA2 1981) ("The law of the case will be disregarded only when the court has 'a clear conviction of error' ") (citation omitted), cert denied, 459 U.S. 828, 103 S.Ct. 65, 74 L.Ed.2d 66 (1982). While adherence to the law of the case will not shield an incorrect jurisdictional decision should this Court choose to grant review, see supra, at ___, it will obviate the necessity for us to resolve every marginal jurisdictional dispute." *Ibid.*

In *Christianson*, the coordinate courts were courts of the same rank. That is, they were both federal courts of appeals. However, the coordinate court aspect of the law of the case doctrine is not limited to courts of precisely equal rank. In the federal courts, a prior ruling of a state court may be a ruling of a "coordinate court" for law-of-the-case purposes. *Barrett* v. *Baylor*, 457 F.2d 119, 123-24 (7th Cir. 1972); *Greene* v. *Massey*, 706 F.2d 548, 553 (5th Cir. 1983); *Gage* v. *General Motors*, 796 F.2d 345, 349-50 (10th Cir. 1986); 1B Moore's, *supra* p. 2, ¶ 0.404[7] at 155.[8] Two appellate courts are "coordinate" for this purpose if neither stands above the other on the same appellate ladder.

B. The Exceptions.

The three exceptions to the preclusive effect of the law of the case demonstrate that the doctrine has enough "play in the joints" to meet the legitimate purpose of federal habeas corpus. The exceptions are (1) new evidence; (2) subsequent retroactive change in the law; (3) the prior decision was clearly erroneous and would work a manifest injustice. *Greene* v. *Massey*, *supra*, 706 F.2d at 556.

The new evidence exception permits the use of habeas corpus to remedy denials of rights which do not appear in the appellate record. Ineffective assistance of counsel is the most common claim of this type. If the claim is that trial counsel did not investigate a defense or alibi, that very failure will necessarily cause the appellate record to be inadequate and require that new evidence be introduced on habeas.[9]

The second exception, a subsequent retroactive change in the law, would apply in the event of a landmark decision going to the fundamental fairness of the trial. *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), for example, was applied retroactively to grant

8 These authorities refer to state court determinations of state law. The federal question aspect is discussed *infra* in part IV. D., pp. 24-28.

9 This exception would not apply, however, if all of the important evidence was considered in a state collateral proceeding.

habeas to unrepresented petitioners whose convictions had become final before the decision. See *Tehan* v. *Shott*, 382 U.S. 406, 416 (1966).

The final exception deals with the heart of the problem in the present case and in most habeas cases. Respondent sought and obtained habeas relief from the Eighth Circuit based on its mere disagreement with the state court on a close question. As is typical in habeas cases, the state court decision is mentioned only in the discussion of the facts. *Thomas* v. *Morris*, 844 F.2d 1337, 1338 (8th Cir. 1988). It is not mentioned at all in the legal analysis, as if the state appellate system did not exist.

Under a law of the case approach, the task of the federal court would be greatly simplified and the dignity of the state courts greatly enhanced. The first question would be whether the state court decision is "clearly erroneous." A decision is clearly erroneous only if it violates a precedent binding on the court which decided it or if it violates the clear language of the Constitution or the statute in question. If the state courts are truly renegade, this standard allows the federal courts to force them to "toe the constitutional mark." If not, simple disagreement with another court does not justify the drastic remedy of nullifying a final judgment.

The second part of the third exception is "manifest injustice."[10] Consistently with this Court's jurisprudence on procedural defaults, see *Murray* v. *Carrier*, 477 U.S. 478, 496 (1986), this exception keeps the door open for the truly innocent.

10 There seems to be some doubt whether "clearly erroneous" and "manifest injustice" are conjunctive or disjunctive conditions. Compare *Doe* v. *New York City Dept. of Social Services*, 709 F.2d 782, 789 (2nd Cir. 1983) with *White* v. *Murtha*, *supra*, p. 19, 377 F.2d at 431-32. As neither condition is met in the present case, that point need not be addressed here.

C. Application on Collateral Attack on Convictions.

Deferring for a moment the question of state court versus federal court rulings on federal questions, the threshold question is whether the law of the case doctrine has any application to collateral attacks on conviction. The cases that have considered the matter have generally held that it does.

The most obvious application of the doctrine is in a habeas petition raising issues addressed by this Court on the direct appeal. In that situation, the Second Circuit decided that the doctrine applied in *United States ex rel. Epton* v. *Nenna*, 446 F.2d 363, 365-66 (1971).[11]

The next, and more common, application is a successive federal habeas petition raising an issue considered by the federal court of appeals on the first petition. Again the courts of appeals have generally had little difficulty finding the doctrine applicable. *Bromley* v. *Crisp*, 561 F.2d 1351, 1361 (10th Cir.1977); *Raulerson* v. *Wainwright*, 753 F.2d 869, 875 (11th Cir. 1985). The court in *Lacy* v. *Gardino*, 791 F.2d 980, 984-85 (1st Cir. 1986) expressed some doubt but did not reach the question. *Burton* v. *Foltz*, 810 F.2d 118, 120 (6th Cir.1987) assumed the doctrine to be generally applicable, but found that it did not apply to rulings which had been vacated by a higher court, and also found that the change in controlling law exception applied. *Id.* at 121.

Cases involving collateral attacks by federal prisoners confirm that the law of the case doctrine applies to such attacks. In *Davis* v. *United States*, 417 U.S. 333, 341-42 (1974), this Court implied that the doctrine generally applies to proceedings under 28

11 This case relates to the higher court mandate facet of law of the case, see 1B Moore's, *supra* p. 2, ¶ 0.404[10] at 169-74, rather than the coordinate court aspect.

U.S.C. § 2255, but held that the change in controlling law exception applied. The courts of appeals have applied the doctrine to Rule 35(a) motions in *United States* v. *Mazak*, 789 F.2d 580, 581 (7th Cir. 1986); *Ekberg* v. *United States*, 167 F.2d 380, 384, n. 4 (1st Cir. 1948); and *Paul* v. *United States*, 734 F.2d 1064 (5th Cir. 1984). See also 18 Wright, *supra* p. 19, 1988 supp. at 413.

There seems to be general consensus among those courts that have considered the question that the doctrine of the law of the case applies generally to collateral attacks on convictions and that the appeal and any prior collateral attacks are "closely related" proceedings. The only question remaining is whether a state appellate court is a "coordinate court" for the purpose of applying the doctrine. There seems to be no doubt of this as to questions of state law. *Greene* v. *Massey*, 706 F.2d 548, 553 (5th Cir. 1983). Should the result be any different on federal questions?

D. Federal Questions in State Courts.

The heart of the question is whether the decision of a state appellate court on a federal question is entitled to respect as the decision of a "coordinate court." For civil cases, Moore asserts that "the federal court would not be obliged to follow the state court's law of the case," 1B Moore's ¶, *supra* p. 2, 0.404[7] at 155, yet his primary authority for this proposition implies just the opposite. He quotes Justice Holmes in *Remington* v. *Central Pacific R.R.*, 198 U.S. 95, 99-100 (1905) stating that the state court decision was not *res judicata* and permitting the Circuit Court to reexamine the decision on the *same* basis as if the Circuit Court itself had made the decision. 1B Moore's ¶ 0.404[6] at 151.[12] If Justice Holmes is correct then the law of the case

12 Moore's only other authority is a 1939 district court case. *Id.* at 151 n. 12.

doctrine *does* apply. The state decision on the federal question stands no higher than a prior federal court of appeals decision, but it also stands no lower.

Still, the contention is made that criminal cases are different and that the defendant must have a federal de novo hearing. See part III. B., p. 13 *supra*. This argument "stem[s] from a basic mistrust of the state courts as fair and competent forums for the adjudication of federal constitutional rights." *Stone* v. *Powell*, 428 U.S. 465, 493-94 n. 35 (1976). The *Stone* court answered this argument.

> "The principal rationale for this view emphasizes the broad differences in the respective institutional settings within which federal judges and state judges operate. Despite differences in institutional environment and the unsympathetic attitude to federal constitutional claims of some state judges in years past, we are unwilling to assume that there now exists a general lack of appropriate sensitivity to constitutional rights in the trial and appellate courts of the several States. State courts, like federal courts, have a constitutional obligation to safeguard personal liberties and to uphold federal law. *Martin* v. *Hunter's Lessee*, 1 Wheat 304, 341-44 (1816)." *Ibid.*

We have already noted that some federal rights are already enforced primarily or exclusively in the state courts, *supra* p. 13, that some rights are more distinctly federal than others, *supra* pp. 14-15, that the acceptance of federal authority in the states is more complete than at any other time in history, *supra* pp. 10-11, and that the actual innocence of the petitioner is an important factor in deciding what disposition "law and justice require," *supra* pp. 16-19.

We propose that the competing considerations call for the division of federal habeas claims into three categories. First, the decision in *Rose* v. *Mitchell*, 443 U.S. 545 (1979) should remain in force, permitting de novo review of equal protection claims of

discrimination on the basis of race. The unique history of claims of this type places a burden of proof on those who would abolish de novo review; we do not believe that burden has been met. For the reasons stated in *Rose*, the case for federal intervention is particularly strong for claims of this type.

Second, the decision in *Stone* v. *Powell*, 428 U.S. 465 (1976) should also stand. The exclusionary rule is a unique creature of criminal procedure, with no relation whatever to the fairness of the trial, and complete preclusion following a full and fair state hearing is appropriate.

Finally, for the remainder of federal questions, we propose that the state court decision be considered that of a "coordinate court" and respected as the law of the case subject to the "flexible contours" of that doctrine. See *Arizona* v. *California*, 460 U.S. 605, 618-19 (1983). Where state collateral proceedings are adequate to develop facts not in the appellate record and where no change in the law which applies retroactively on habeas is in issue, federal habeas review would be limited to the questions of whether the state decision was "clearly erroneous" and whether there has been a miscarriage of justice.

The most dramatic change that would be made by the rule we propose is that the lower federal courts would lose the authority to make new federal rules of criminal procedure which are binding on the states. At the present stage in the development of the law of criminal procedure, that authority is unnecessary and disruptive. The task of making new federal rules which are binding on the states properly belongs to this Court alone, and it has made enough of them in the past few decades that the core issues have all been dealt with. Any new rules benefiting defendants must necessarily be on the fringe. There are no rules of *Gideon* magnitude remaining to be made. See Bator, *supra* p. 4, at 523-24. The inability of lower federal courts to make new rules will not hinder the progress of justice. The only claims foreclosed will be the marginal ones on which reasonable people differ; the

relitigation of such claims does not justify reopening final judgments.

From the standpoint of individual cases, the question is whether justice would be better served by the rule we propose than it is by the present system. The fact that a second review is conducted does not necessarily mean that justice is better done. *Brown* v. *Allen*, *supra*, 344 U.S. at 540 (Jackson, J., concurring). If we define the "right" answer to be the one which this Court would have reached had it granted certiorari,[13] is that "right" answer more likely to be reached by allowing de novo review in the lower federal courts of every federal claim? Not necessarily.

The claim has been made that "[t]o the extent state trial and appellate judges faithfully, accurately, and assiduously apply federal law and the constitutional principles enunciated by the federal courts, such determinations will be vindicated on the merits when collaterally attacked." *Stone* v. *Powell*, 428 U.S. 465, 529-30 (1976) (Brennan, J., dissenting). Is this confident assertion really justified? The California Supreme Court faithfully, accurately, and assiduously applied federal law in *People* v. *Harris*, 28 Cal.3d 935, 623 P.2d 240 (1981). That decision was *not* vindicated by federal court of appeals on habeas. *Harris* v. *Pulley*, 692 F.2d 1189 (9th Cir. 1982). The grave injustice to the people of California resulting from the court of appeals's nullification of their perfectly proper judgment was corrected only because this Court saw fit to grant certiorari and reverse. *Pulley* v. *Harris*, 465 U.S. 37 (1984). "Misapplication of this Court's opinions is not confined to the state courts...." *Amalgamated Clothing Workers of America* v. *Richman Bros. Co.*, 348 U.S. 511, 519 (1955).

13 "We are not final because we are infallible, but we are infallible only because we are final." *Ibid.*

Few would disagree with the maxim that it is better to let the guilty go free than to punish the innocent. 4 W. Blackstone, *Commentaries* 352 (1769). In the absence of any claim of innocence, however, the balance is quite different. When the state courts and lower federal courts disagree on a close question and this Court denies certiorari, we do not know which court is "right." We must choose between the risk of vacating a sentence which was properly imposed if the state court is right and the risk of leaving a sentence in place despite a constitutional procedural error if the federal court is right. *If the habeas petitioner is in fact guilty*, amicus submits that the erroneous grant of habeas is a greater injustice than the erroneous denial. The law of the case doctrine with its "manifest injustice" safety valve thus optimizes the quest for justice.

Adoption of a law-of-the-case rule will save an enormous amount of time for the federal courts as institutions and especially for the judges individually. The decision of a point of law on which there is no controlling precedent is a task which the judge cannot delegate, but legal research to determine whether another court's decision is or is not in violation of a controlling precedent is delegable to a far greater degree.

Most importantly, the "manifest injustice" prong of the law of the case doctrine would help restore public respect for the law by reserving the extraordinary remedy of collateral attack on a final judgment for those who genuinely deserve it. "Although, if past experience is any guide, I am sure I will be accused of proposing to abolish habeas corpus, my aim is rather to restore the Great Writ to its deservedly high estate and rescue it from the disrepute invited by current excesses." Friendly, *supra*, p. 8, at 143.

V. The state court decision was entitled to respect as the law of the case.

The law of the case doctrine does not bind this Court when it grants certiorari. *Christianson* v. *Colt Industries Operating Corp.*, 108 S.Ct. 2166, 2178, 100 L.Ed.2d 811, 831 (1988). This Court therefore may, and perhaps should, address the merits. That does not mean, however, that the preclusion issue should be ignored. As the Court did in *Christianson* and as the plurality did in *Kuhlmann* v. *Wilson*, 477 U.S. 436, 444-55 (1986), the Court should address the rule of preclusion that should have been followed below. If rules binding only on lower courts are never addressed by this Court, there will be no uniformity and chaos will follow.

Neither of the first two exceptions to the law of the case doctrine applies. There are no new facts or new law. The third exception is also inapplicable. The state court decision is clearly not "clearly erroneous." The 5-4 division on the merits in the court below is evidence enough of that. Most importantly, there has been no injustice committed here. The sentence imposed on petitioner is not greater than the maximum he could have received from a rational sentencer properly applying the law. If *State* v. *Olds*, 603 S.W.2d 501 (Mo.1980) had been decided before Thomas's sentencing, he would surely have received the very sentence he is now serving: life imprisonment for the murder. By no stretch of the imagination could this be considered an injustice.

VI. Conclusion

The decision of the Eighth Circuit should be reversed and the case remanded with directions to deny the petition for writ of habeas corpus.

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Respectfully submitted,

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